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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 585/53

LAMBERT RUN COAL COMPANY, PETITIONER,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Record filed

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UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Asheville, North Carolina, on the first Tuesday in July, beng the sixth day of the same month, in the year of our Lord one thousand nine hundred and twenty.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge.

AMONG other were the following proceedings, to-wit:

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

BE IT REMEMBERED that heretofore, to-wit, on July 19, 1920, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

Transcript of Record of Circuit Court Marion County

Filed June 29, 1920.

Lambert Run Coal Company
vs.
The Baltimore & Ohio Railroad Company.

STATE OF WEST VIRGINIA,
(2) County of Marion, to-wit:

Be it remembered that heretofore, to-wit, on the 12th day of June, 1920, a praecipe was filed in the office of the Clerk of the Circuit Court of Marion County, West Virginia, said praecipe being in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
Baltimore & Ohio Railroad Company,
Defendant.
} In Equity. No. ————

Issue summons to Defendant returnable to July rules.

JOHN A. HOWARD,
BUTLER, LAMB, FOSTER & POPE,
Solicitors for Plaintiff.

RUSH C. BUTLER,
ERNEST S. BALLARD,
FRANK E. HARKNESS,
Of Counsel.

June 12, 1920.

(3) The summons issued by the Clerk of said Circuit Court with the returns of service thereon are in words and figures following:

State of West Virginia
To the Sheriff of Marion County, Greeting:

You are hereby commanded to summon Baltimore & Ohio Railroad Company to appear before the Circuit Court of Marion County, at rules to be held in the Clerk's Office of said Court on the first Monday in July, 1920, to answer a bill in chancery exhibited against it in said Court by Lambert Run Coal Company.

And have then there this writ.

Witness, Clarence Currey, Clerk of said Court, at Court House in said County, the 12th day of June, 1920, and 57th year of the State.

CLARENCE CURREY, Clerk.

Executed the within summons on the within named The Baltimore & Ohio Railroad Company, a corporation, on the 12th day of June, 1920, by delivering on that day a copy thereof to T. D. Connell, Depot agent in the actual employment of the said Corporation, in the County of Marion, in the State of West Virginia, that being the county and State wherein the said T. D. Connell, the Depot Agent, in the actual employment of the said Corporation, resides, the President or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, and the Secretary, (4) Treasurer and Cashier of said Corporation, and the members of the Board of Directors thereof, all being absent from my county, and there being no other person within the said State than the said T. D. Connell, the said Depot Agent, upon whom there can be service of said summons.

HOWARD ADAMS,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

Served the within writ by delivering a true copy thereof to T. D. Connell of the Defendant, the Baltimore and Ohio Railroad Company, at the place in Marion County, West Virginia, where said defendant Corporation does business this 12th day of June, 1920. The principal office of the Defendant Corporation, not being in

the State of West Virginia. The President or other chief officer of the Defendant Corporation not residing in the State of West Virginia and the said Defendant Corporation doing business in Marion County, West Virginia.

HOWARD ADAMS,
Deputy for A. M. Glover, Sheriff of Marion County, W. Va.

(5) Order filing bill of complaint and Notice of Motion for injunction, Entering motion for injunction, filing petition, notices and bond for removal, and approving bond and ordering removal Entered by said Circuit Court on the 19th day of June, 1920, is in words and figures following:

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company. } In Chancery.

This day came the plaintiff, Lambert Run Coal Company, and tendered and asked leave to file its bill of complaint verified under oath, and also a notice in writing, duly served on the defendant, The Baltimore and Ohio Railroad Company, of said plaintiffs' motion for an injunction hereinafter mentioned and it is ordered that said bill and notice be and the same are hereby filed and thereupon said plaintiff moved the Court to award an injunction pursuant to the prayer of said bill. Thereupon came the defendant, The Baltimore and Ohio Railroad Company, and the defendant herein having given written notices to the plaintiff (and also to the Northern West Virginia Coal Operators Association), of its intention to file in this Court a petition and bond for the removal of this cause to the District Court of the United States for the Northern District of West Virginia prior to the filing of the same, and this being within the time provided by law for the filing of its petition and bond as aforesaid, and said Northern West Virginia Coal Operators Association not having appeared nor filed any peti-
(6) tion for intervention or to be joined as a party to this suit, and not now being a party to this suit, the de-

fendant filed its petition for removal of this cause to the District Court of the United States for the Northern District of West Virginia, and at the same time offered its bond, in the sum of one Thousand Dollars, with National Surety Company good and sufficient surety, pursuant to statute, and conditioned according to law. On consideration whereof it is ordered that said petition and bond and said notices so given by said defendant, be, and the same are hereby, filed, and this Court does hereby accept and approve said bond, and accept said petition and does order that this cause be, and the same is hereby, removed for trial to the next District Court of the United States for the Northern District of West Virginia, pursuant to the statute of the United States, and that all other proceedings in this Court in this cause be stayed.

(7) Notice of application for an injunction with return of service thereon filed in Open Court, June 19, 1920, is in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
Baltimore & Ohio Railroad Company, Defendant.

No Equity.
No. ———

NOTICE.

To the Defendant:

Please take notice that on the 19th day of June, 1920, at ten o'clock in the forenoon, or as soon thereafter as the matter may be heard, the Plaintiff will make application for an order of injunction enjoining you as prayed for in the Bill of Complaint to be filed in said cause, a copy of which is attached hereto, before the Honorable W. S. Haymond, Judge of said Court in Chancery at the Court House, Fairmont, West Virginia.

We also hand you herewith copies of affidavits of James M. Orr, Cletus H. Jenkins, Brooks Fleming, Jr., Samuel D. Brady and Claude M. Stubbins, which affida-

vits will be read to the Court in support of our motion for such order.

LAMBERT RUN COAL COMPANY,
JOHN A. HOWARD,
By BUTLER, LAMB, FOSTER & POPE,
Its Solicitors.

(8) Executed the within notice on the within named The Baltimore & Ohio Railroad Company, a corporation, on the 15th day of June, 1920, by delivering on that day a copy thereof to T. D. Connell, the depot agent in the actual employment of the said corporation, in the County of Marion, in the State of West Virginia, that being the county and State wherein the said T. D. Connell, the depot agent in the actual employment of the said corporation, resides, the president or other chief officer of said corporation, and the person appointed pursuant to law to accept service of process for it, and the secretary treasurer, and cashier of said corporation, and the members of the Board of Directors thereof, all being absent from my county, and there being no other person within the said State than the said T. D. Connell, the said depot agent, upon whom there can be service of said notice.

H. E. WOODWARD,
Deputy for A. M. Glover, Sheriff of Marion County,
West Virginia.

(9) The Bill of Complaint, filed in Open Court June 19, 1920, is in words and figures following:

IN THE

CIRCUIT COURT OF MARION COUNTY

STATE OF WEST VIRGINIA

LAMBERT RUN COAL COMPANY, *Plaintiff*,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant.

In Equity No. .....

BILL OF COMPLAINT.

JOHN A. HOWARD,
BUTLER, LAMB, FOSTER & POPE,
Solicitors for Plaintiff.

RUSH C. BUTLER,
ERNEST S. BALLARD,
FRANK E. HARKNESS,
Of Counsel.

IN THE

CIRCUIT COURT OF MARION COUNTY

(10) STATE OF WEST VIRGINIA

LAMBERT RUN COAL COMPANY, *Plaintiff*,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Defendant.

In Equity No. ....

BILL OF COMPLAINT.

To the Honorable Judge of the Circuit Court of the County of Marion, State of West Virginia, in Equity Sitting:

Plaintiff respectfully represents:

1. That plaintiff, Lambert Run Coal Company, a corporation organized and existing under the laws of the

State of West Virginia, with its principal office in the City of Fairmont and County of Marion in said State, brings this, its bill of complaint, on behalf of itself, and also on behalf of such other operators of coal mines served by defendant as are situated similarly to plaintiff and desire relief similar to that herein sought and who shall intervene in this suit.

2. That defendant, The Baltimore & Ohio Railroad Company, is a corporation organized and existing under the laws of the State of Maryland, and is a common carrier by railroad engaged in the transportation of passengers and property between points in the State of West Virginia, and points in other States, and as such is subject to the Interstate Commerce Act, to-wit: the Act to Regulate Commerce as amended by the Transportation Act, 1920.

3. That this is a suit of a civil nature in equity. This suit necessarily involves and presents for decision the construction of the aforesaid Interstate Commerce Act and particularly paragraph (12) of Section 1 thereof, which said paragraph reads as follows, to-wit:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

And plaintiff shows that it is entitled under and by

virtue of the provisions of said paragraph, during periods when the supply of cars available on defendant's line for transportation of coal does not equal the requirements of the mines served by it, to a distributative share of such cars proportionate to the rating of its mine, and that by the acts of the defendant hereinafter complained of the plaintiff is deprived of such share of cars available for the transportation of coal to its great and irreparable damage as hereinafter more particularly set forth.

4. That plaintiff is, and for thirteen years last past has been, engaged in the business of mining, producing, selling and shipping bituminous coal and owns and operates a mine known as the Clauson Mine, having a maximum daily productive capacity of approximately 600 tons, and a daily rated capacity according to the ratings established by the defendant as hereinafter more particularly set forth, of 575 tons, which said mine is located upon the line of the defendant in said State and connected therewith by a switch connection and is served exclusively by, and dependent upon, the said defendant as an initial carrier for the transportation of the coal so mined to the purchasers and consumers thereof.

That plaintiff has, in the conduct of its business aforesaid, built up a valuable goodwill, and has an extensive market for the coal produced and mined by it as aforesaid, throughout the State of West Virginia and neighboring States, the preservation of which goodwill and business depends upon the constant production of coal and the uninterrupted conduct of its mining operations. The character of the coal mined by the plaintiff and the location of plaintiff's said mine are such that it is not practible to store said coal, and in order to maintain and continue its operations it is necessary that it should receive from defendant adequate railroad facilities for the transportation of its coal as and when mined over the lines of the defendant, all as hereinafter more fully set forth.

That in addition to the said mine of the plaintiff there are many other bituminous coal mines served by the defendant, to-wit: above 750, with many of which the

plaintiff, in its said business of mining, producing, selling and shipping bituminous coal, is in competition.

5. That for many years last past the defendant has maintained ratings of the capacity of the mines of the plaintiff and of the mines of plaintiff's competitors and all other mines served by the defendant, which ratings are for the purpose of determining the distribution of cars to the said mines and are commonly called mine ratings.

That under paragraph (12) of Section 1 of the said Act the defendant now maintains such mine ratings, the rules governing the establishment and application of which are as set forth in Exhibit A, attached to this bill of complaint and hereby made a part hereof.

That under said rules the defendant has in the past, from time to time, established mine ratings for the respective mines served by it including a rating of the plaintiff's said mine which said rating as most recently established, to-wit: for the period from May 10 to June 9, inclusive, 1920, was 11.5 fifty-ton cars per day.

That under paragraph (12) of Section 1 of the said Act defendant is obligated and required to make just and reasonable distribution of cars for transportation of coal among coal mines served by it and, during any period when the supply of cars available on its line for transportation of coal does not equal the requirements of the mines served by the defendant, to apply the said mine ratings and count each and every car furnished to or used by any such mine for transportation of coal against that mine; and during any such period, plaintiff is entitled to receive a share of such cars based on the application of the said mine ratings and the counting of each and every car as aforesaid, and is further entitled to the benefit and protection of the provisions of said paragraph 12 of said Section 1 to the end that no other coal mine located on the defendant's line shall receive a greater proportionate share of such cars either because of failure of the defendant to apply said mine ratings or to count each and every car as aforesaid, or for any other cause or reason whatsoever.

6. That for many weeks last past the supply of cars

available on the defendant's line for transportation of coal has not been, and is not now, equal to the requirements of the mines served by it, but on the contrary there has been and is an acute shortage of such cars and the supply thereof has been and is inadequate to meet the requirements of the business of the defendant.

That although under paragraph (12) of Section 1 of the said Act the defendant, under the circumstances above alleged is bound, in making distribution of cars available on its line for transportation of coal, among the coal mines served by it, to maintain and apply the mine ratings of such mines and to count each and every car furnished to or used by a mine for transportation of coal against that mine, the defendant for many weeks last past has failed, refused and neglected, and now fails, refuses and neglects so to do, but on the contrary has for many weeks last past furnished and now furnishes cars for transportation of coal to certain of the mines served by it other than the plaintiff's said mine in excess of the share to which the said other mines were and are entitled under the application of their respective mine ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine, while at the same time failing and refusing to furnish to the said mine of the plaintiff the share of such cars to which the said mine was and is entitled on the said basis, the said unlawful distribution being made and effected by defendant under and in pursuance of certain car distribution rules maintained and applied by it and now in effect, which said rules are as set forth in Exhibit A, attached to this bill of complaint and made a part hereof.

Plaintiff is informed and believes and therefore alleges the fact to be that the acute car shortage hereinbefore referred to is continuing and will continue for a long time to come and that the supply of cars available on the defendant's line for transportation of coal shipped from the mines served by it will not equal the requirements of the said mines but will be inadequate to meet such requirements.

Plaintiff further alleges that it has made earnest and repeated requests upon the defendant and has constantly attempted to persuade and induce the defendant by all

lawful means within its power to discontinue the defendant's said unlawful practice with respect to the distribution of cars available on the defendant's line for transportation of coal, among the mines served by it, but the defendant has failed, neglected and declined to cease and desist from the said unlawful practice and intends, proposes and threatens to continue the same without abatement or alteration in any particular and, as plaintiff is informed and believes and therefore alleges, will so continue the same unless restrained by the order of this Court as hereinafter prayed, all to the great and irreparable damage and injury of the plaintiff as hereinafter more fully set forth.

7. Plaintiff is informed and believes and therefore alleges the fact to be that prior to the assumption by the Federal Government of control of the railroad of defendant and other railroads in the United States (hereinafter referred to as Federal control), it was the general practice of many railroads serving bituminous coal mines, during periods when the supply of cars available on their respective lines for transportation of coal did not equal the requirements of the mines served by them respectively, to deliver cars for the transportation of railway fuel coal, to the mines furnishing such coal, in excess of the share of the cars available on their respective lines for transportation of coal to which such mines would have been entitled under a distribution proportionate to their respective mine ratings, which practice is generally referred to as the practice of assigning cars; that during Federal control the said practice of assigning cars continued in effect until it came to the attention of the United States Fuel Administrator and he thereupon made representations to the Director General of Railroads with respect to its disastrous effect upon the coal mining industry and urged its discontinuance and the substatution therefor of the practice of distributing all cars for transportation of coal in proportion to the ratings of the respective mines; that the Director General of Railroads declined to accede to the representations of the United States Fuel Administrator and thereupon the question was presented to the President and considered by him in conference with the United States

Fuel Administrator and the Director General of Railroads, and as a result of the said reference to the President the United States Fuel Administrator issued a statement and order in the words and figures following, to-wit:

"May 24th, 1918.

Ten cents a short ton was stricken from the mine price of all bituminous coal in the United States, by order of Fuel Administrator H. A. Garfield tonight. The new price takes effect at seven o'clock tomorrow morning, and represents an average reduction of nearly five per cent. The order reads as follows:

'THE UNITED STATES FUEL ADMINISTRATOR, acting under authority of an Executive Order of the President dated 23 August, 1917, appointing said Administrator and of subsequent Executive Orders and in furtherance of said Orders and of the Act of Congress therein referred to and approved August 10, 1917.

Hereby orders and directs that all prices for bituminous coal f. o. b. mines in the coal producing districts throughout the United States fixed by the said Executive Order of the President dated 21 August, 1917, and subsequent orders of the United States Fuel Administrator and in effect at 7 A. M. on the 25th day of May, 1918, shall be and the same hereby are reduced as to all shipments made after 7 A. M. on the 25th day of May, 1918, by the sum of ten cents for each net ton of 2,000 pounds.

This order shall in no way affect the increase contained in the Executive Order of the President, dated 27 October, 1917, adding the sum of forty-five cents to the prices fixed for bituminous coal under the terms and provisions set forth in said last mentioned Order.'

The reduction will mean an annual saving to consumers of a sum estimated by the Fuel Administration at $60,000,000. The President has directed that the railroads pay the Government price for coal. The increased cost of railroad fuel thereby occasioned is also estimated at $60,000,000 per annum. The reduction of 10 cents per ton on all coal will, however, reduce the net increased cost to the railroads to $45,000,000 per annum. Under the President's plan, the railroads will furnish cars to

all coal mines alike, without discrimination except as dictated by the prior requirements of the railroads for operating purposes and the needs of domestic consumers and of the war.

Under the present war demands, the maximum output of every mine working at full time would still be insufficient to meet the country's coal needs. The principle of equal car supply has accordingly been adopted so as to make for as steady an operation as possible of all properties, and for continuous employment of men, thus making for maximum output.

The introduction of the principle of even car supply will reduce the general average overhead of mine operation, and thereby justifies the Administration in putting out a price reduction order. It is understood that the mine prices thus fixed will remain undisturbed until the United States Fuel Administrator has before him the cost returns for the twelve months ending August 31, 1918. The returns thus far in are being carefully studied by Fuel Administration accountants and engineers with a view to making the utmost saving to the public that is consistent with a maximum production of coal.

The order issued tonight will have no effect on the price of anthracite coal, which forms the bulk of the domestic consumption fuel in the eastern part of the country.

Consumers of bituminous coal who have already entered their orders for the year's coal supply, but whose coal has not yet been delivered, will, of course, receive their supplies at the reduced price effective tomorrow. This price applies to all coal which leaves the mines after seven A. M., May 25, no matter how long the order for the delivery of the coal has been standing.

Coal delivered after seven A. M., May 25, under contracts which have been entered into since December 29, 1917, will be billed at the new price. Under the regulation of the Fuel Administration all such contracts call for the delivery of coal at the government price effective at the time of delivery."

Plaintiff is informed and believes and therefore alleges the fact to be that thereafter and on or about July 1, 1918, the Director General of Railroads, in execution of the policy announced in the said order of the United

States Fuel Administrator, issued an order putting into effect the distribution of all cars available for transportation of coal in proportion to mine ratings, in the Eastern, Allegheny and Pocahontas Regions, which said order was in the words and figures following, to-wit:

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
Washington, July 1, 1918.
DIVISION OF OPERATION In reply refer to File No.
CAR SERVICE SECTION 257-52
W. C. Kendall, Manager
W. L. Barnes
A. G. Gutheim
W. J. McGarry
C. B. Phelps
G. F. Richardson
Assistant Managers.

Mr. A. H. Smith,
Regional Director, Eastern Region,
New York City.
Mr. C. H. Markham,
Regional Director, Allegheny Region,
Philadelphia, Penna.
Mr. N. D. Maher,
Regional Director, Pocahontas Region,
Roanoke, Virginia.

Dear Sir:—

Effective June 24, 1918, the assignment of cars for loading of railroad fuel at mines on the Pennsylvania Railroad, the B. & O. Railroad, Lines East, and their short line connections were cancelled. It is now desired that the assignment of cars for railroad fuel loading shall be cancelled on all other lines in the Eastern, Allegheny and Pocahontas Regions, effective July 5, 1918. This is to request that you so arrange.

The United States Fuel Administration is advised of these instructions and through its District Representatives in the coal producing districts will obtain an adequate current supply of coal of substantially like quality as has heretofore been had unless vital war necessities

makes this impossible. In the latter event the Fuel Administration will handle the matter with the Railroad Administration in Washington and the Purchasing Committee here will deal with individual railroads on the subject as may be necessary. Should the result of this order be to deplete the essential coal supply of any road, the Car Service Section should be advised by wire immediately.

We beg to suggest that all the coal producing roads in your territory who will cancel their assigned car orders in accordance therewith, should immediately wire all foreign lines obtaining fuel from mines on their roads, so that such foreign lines will be advised of the change in car distribution.

CAR SERVICE SECTION.

4
CC to Mr. H. B. Spencer,
J. D. A. Morrow,
A. W. Calloway,
W. A. Marsh."

Plaintiff is informed and believes and therefore alleges the fact to be that thereafter and effective July 10, 1918, a similar order was issued by the Director General of Railroads, putting into effect the distribution of all cars available for transportation of coal in proportion to mine ratings, throughout the remainder of the United States, which said order was in the words and figures following, to-wit:

UNITED STATES RAILROAD ADMINISTRATION
Director General of Railroads
Washington, July 6, 1918. j
DIVISION OF OPERATION In reply refer to File No.
CAR SERVICE SECTION 257-52

W. C. Kendall, Manager
W. L. Barnes
A. G. Gutheim
W. J. McGarry
C. B. Phelps
G. F. Richardson
Assistant Managers.

Mr. B. L. Winchell,
Regional Director, Southern Region,
Atlanta, Georgia.
Mr. R. H. Aishton,
Regional Director, Northwestern Region,
Chicago, Illinois.
Mr. Hale Holden,
Regional Director, Central Western Region,
Chicago, Illinois.
Mr. B. F. Bush,
Regional Director, Southwestern Region,
St. Louis, Mo.

Dear Sir:—

Effective July 10th, 1918, please abolish the practice of assigning cars for railroad fuel loading at bituminous coal mines on all lines of railroad in the Southern, Southwestern, Central Western and Northwestern Regions. This will complete the program of abolishment of this practice in the entire country.

The United States Fuel Administration is advised of these instructions and through its District Representatives in the coal producing districts affected will see that the carriers who draw fuel from such districts will obtain an adequate current supply of coal of substantially like quality as has heretofore been had unless vital war necessities make this impossible. In the latter event, the Fuel Administration will handle the matter with the Railroad Administration in Washington, and the Purchasing Committee here will deal with individual railroads on the subject as may be necessary.

Should the result of this order be to deplete the essential coal supply of any road the Car Service Section should be advised by wire immediately.

We beg to suggest that all the coal producing roads in your territory which will cancel their assigned car orders in accordance therewith, should immediately wire all foreign lines obtaining fuel from mines on their road so that such foreign lines will be advised of the change in car distribution.

CAR SERVICE SECTION.

4
CC to Messrs. H. B. Spencer
F. M. Whitaker
J. D. A. Morrow
A. W. Calloway
W. A. Marsh."

Plaintiff is informed and believes and therefore alleges the fact to be that thereafter and until the termination of Federal control the said system of distribution of all cars available for transportation of coal in proportion to mine ratings was generally observed on all of the railroads of the United States.

Plaintiff further alleges that after the termination of Federal control and on February 29, 1920, the said practice of distribution of all cars available for transportation of coal in proportion to mine ratings was continued by the defendant and many railroads throughout the United States until on or about April 15, 1920, when the defendant discontinued the said practice and inaugurated the practice hereinbefore described of assigning to certain of the mines served by it, other than the plaintiff's said mine, cars for the transportation of railway fuel coal in excess of the share of cars available on its line for transportation of coal to which the said other mines would have been entitled under the maintenance and application of their respective mine ratings and the counting of each and every car furnished to, or used by, a mine for transportation of coal, against that mine, and distributing to the said mine of the plaintiff fewer cars than it was entitled to on the said basis.

8. That bituminous coal tends to deteriorate if placed in storage after being mined, and is also subject to serious danger from spontaneous combustion when stored, and in many instances storage of coal is impracticable because of the location of the mine producing it and the contour of the ground surrounding the mouth thereof. In the great majority of instances, for one or more of the reasons aforesaid, it is impracticable or dangerous to store bituminous coal at the mine, and mines therefore cannot usually be operated except when they are able to load and ship coal as and when it is mined. When any

such mine is unable to load and ship coal as aforesaid, it is compelled to suspend the mining of coal until cars are furnished in which it can be loaded and shipped.

That the operation of plaintiff's said mine and of all bituminous coal mines involves the incurring of numerous and great overhead expenses which are fixed and constant and accrue whether or not the mine is in operation. The said overhead expenses include interest on the investment in the plant (including mine, buildings, machinery, equipment, etc.); taxes and insurance, depreciation on buildings, machinery and equipment; superintendence (including the wages and expenses of the mine superintendent and his permanent force); ventilating and keeping the mine clear of water (including the maintenance and operation of the pumping machinery and the salaries and expenses of the engineer and his staff); the feeding and care of animals used in the operation of the mine; the salaries and expenses of the sales organization; and the salaries and expenses of the general office organization. All of the said expenses are incurred by the plaintiff daily irrespective of the amount of coal produced or whether the mine is or is not in operation.

That every hour of working time that a mine is closed down for any cause increases the amount of overhead cost properly and necessarily chargeable to each ton of coal produced, and the said overhead cost increases with the increase of idle time.

The necessary effect of failure or refusal on the part of a carrier to maintain and apply mine ratings to all of the mines served by it and count each and every car furnished to or used by each and every such mine for transportation of coal against that mine is that the per ton overhead costs of mines receiving less than their proportionate share of cars increase directly as their car supply decreases.

That the chief incentive of mine labor to continue in the service of a particular mine is the regularity of the employment there afforded. As between neighboring mines or mines in the same or neighboring districts, mine labor will go to and remain at the mine which offers the most continuous employment and thereby the greatest opportunity for earning. Mines which have a greater proportion of idle time than other mines either in or out

of the district, are unable to hold their labor and as a result are compelled to operate, when they can operate at all, with a depleted force of laborers consisting of the the lowest and most unreliable grade which is the last to leave on account of unsatisfactory labor conditions. Furthermore a mine with a large proportion of idle time not only loses laborers to other mines having less idle time, but likewise loses laborers to other lines of employment from which it is difficult or impossible to induce them to return to the business of mining.

That the effect of this situation on the spirit and morale of the mine labor is exceedingly injurious and results not only in a shortage of labor but in a distinct and dangerous lowering of the loyalty and assiduity of those who remain, so rendering less efficient the operation of the mine.

That in addition to the effect on overhead cost and mine labor which is above referred to, the idle time of a mine resulting from insufficient car supply has the further serious effect of interfering with its commercial contracts, destroying the good will of its customers, decreasing the number of its patrons, reducing the legitimate profits of its business and generally breaking down and impairing its credit.

That on the other hand, the effect on the operators of mines enjoying assigned cars is to permit the steady operation of the mines and the development and maintenance of their full productive capacity, to decrease the overhead cost of production per ton of coal, to attract labor of the highest grade and furnish it steady and satisfactory employment yielding an adequate annual wage, to build up and maintain their business, increase the number of their customers, enhance the value of their good-will in the trade, and in many other ways to give them advantages over their unfavored competitors which advantages are unlawful and greatly to the detriment and damage of the plaintiff, all others similarly situated and the general public.

9. That the practice of assigning cars has this further effect on the rights and business of the plaintiff and the interests of the public, namely, that cars which are assigned to particular mines are, by reason of such assign-

ment, frequently held idle awaiting placement at and use by the mine to which they are assigned, with the result that the average daily number of cars available for loading at all mines is decreased and the share to which mines receiving no assigned cars are entitled, is reduced beyond the reduction following directly from the assignment and use of cars on a particular day.

10. That all of the considerations relative to the storage of bituminous coal at the mines set forth in paragraph 8 hereof apply at the plaintiff's said mine, that is to say, the coal produced at said mine would deteriorate if placed in storage and would be liable to serious danger of spontaneous combustion, and moreover the location of plaintiff's mine and the contour of the ground surrounding its mouth renders the storage of coal thereat unpracticable, so that when, because of failure of car supply, the coal from its mine cannot be loaded and shipped as and when it is mined, said mine must be shut down and its operation suspended until cars are available for loading and shipping.

That plaintiff incurs in connection with the operation and maintenance of its said mine all the overhead costs mentioned in paragraph 8 hereof, and said overhead costs continue during idle time due to a failure of car supply. That in addition to said overhead costs plaintiff has been and is incurring large expenses during periods of idle time in this, that in order to retain labor at its mine and prevent the disruption of its organization, it has of necessity given its laborers employment not connected with the mining of coal or the operation or maintenance of its said mine, from which employment of such labor the plaintiff derives no profit commensurate with the expense incurred.

11. That because of the acute car shortage that has existed for several months last past, as elsewhere in this bill more particularly set forth, and because of the strike, beginning November 1 and ending about December 15, 1919, which closed practically all of the bituminous coal mines in the United States operated by union labor, there has been ever since November 1, 1919, and prior thereto, and still exists, a demand for coal which cannot be sup-

plied; that there is an actual acute shortage of coal available in yards and at plants and industries of the United States for current use and that the supply of coal on hand available for such current use has been for several weeks last past and is now diminishing; that because of these facts the plaintiff at all times since Apl. 15, 1920, could have sold and disposed of, in the open market and under contracts at prices which would have realized a profit, all coal which its said mine was capable of producing when running at its full capacity, and plaintiff has at all times during said period been ready, willing and able to load with coal produced at its said mine all cars to which it was entitled under its mine ratings during such period, and could and would have disposed of all such coal at a profit as aforesaid.

12. That the plaintiff herein, as a result of the acts and omissions of the defendant complained of herein in failing and refusing to maintain and apply ratings of the mines served by the defendant and to count each and every car furnished to or used by a mine for transportation of coal against that mine, all in violation of the Interstate Commerce Act, and particularly paragraph (12) of Section 1 thereof, has for many weeks passed suffered and is now suffering, all of the damages, losses and injuries to its property and business which are set forth and described herein. That during March, 1920, plaintiff's said mine was entitled to 152.3 fifty-ton cars and received 165.3 such cars, while during May, 1920, plaintiff's said mine was entitled to 140.14 fifty-ton cars and received 108 such cars; that the per-ton overhead expenses of the plaintiff in the production of coal at its said mine were increased during the month of May, 1920, by reason of idle time growing out of insufficient car supply at least in the amount of 19.5 cents; that the miners remaining to the plaintiff are less industrious and efficient and more prone to discontent and disturbance than prior to the inauguration of the said policy of unlawful distribution; that the general business and good-will of the plaintiff has been seriously hurt and damaged and its customers have become dissatisfied; that the profits to which plaintiff is legitimately entitled on its business of mining, shipping and selling coal have been seriously depleted

and diminished; and that because of the unlawful acts of defendant herein complained of the average cost to the plaintiff of producing a ton of coal at its said mine increased from $2.36 in March, 1920, to $3.00 in May, 1920.

13. That the acts of the defendant complained of herein in violation of paragraph (12) of Section 1 of the said Act are of a continuing nature and the only remedy which the plaintiff has at law for enforcing the plaintiff's said rights against the defendant under paragraph (12) of Section 1 of the said Act, is to bring successive suits for damages, which would require the bringing of a multiplicity of suits involving great and burdensome costs and expenses to the plaintiff. Plaintiff further shows that the continuance of said unlawful practices by the defendant will result in the partial or complete disruption of plaintiff's organization and in great and progressively increasing damage to the property, good-will and business of the plaintiff, and a great and permanent decrease in the value thereof, to the irreparable injury of the plaintiff and that the plaintiff is without any adequate remedy at law for such injury, and will continue to suffer all of the said damages, losses and injuries to its property and business as a result of the said threatened and intended continuation of the said unlawful practices of the defendant herein unless defendant is restrained by the order of this court as hereinafter prayed.

14. That there are numerous corporations, firms and individuals operating other mines served by defendant who are in a situation similar to that of the plaintiff as hereinabove set forth, and who have suffered, are suffering and will suffer losses, damages and injuries similar to those suffered by plaintiff as herein alleged and arising out of the aforesaid illegal acts and practices of the defendant; that unless said defendant is restrained and enjoined in this proceeding as prayed herein from continuing said illegal acts and practices as against such of said persons, firms and corporations as desire relief against such acts and practices, there will result a multiplicity of suits and actions, wherefore plaintiff brings this bill on behalf of itself and of all others similarly

situated who shall intervene herein and claim the benefit of the relief herein prayed.

FORASMUCH therefore as the plaintiff is without adequate remedy at law the plaintiff avers that the jurisdiction of this court of equity attaches and that an injunction as hereinafter prayed is the sole means whereby the plaintiff can secure the relief to which it is entitled in the premises and that the questions of law which would be presented in any actions at law if instituted as aforesaid for the purpose of enforcing the Interstate Commerce Act would be the same and can be disposed of in this single proceeding in equity and the entire matter herein adjudged and determined and the plaintiff's rights protected against the unlawful acts of the defendant, thus avoiding a multiplicity of suits, to the end that the said The Baltimore & Ohio Railroad Company which is hereby made party defendant to this the plaintiffs bill of complaint may be required to make full, true and complete answer thereto but not under oath (answer under oath being hereby expressly waived), and that said defendant may be enjoined as hereinafter prayed.

WHEREFORE, the plaintiff prays that the defendant be enjoined, during any period when the supply of cars available on defendant's line for transportation of coal does not equal the requirements of the mines served by defendant, from distributing to any of the mines served by it more cars than the said mines are entitled to under the maintenance and application of their respective mine ratings and the counting of each and every car furnished to or used by a mine for transportation of coal against that mine; and that the defendant likewise be enjoined, during any such period, from distributing to the said mine of the plaintiff a smaller number of cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting against the said mine of each and every car furnished to or used by it for transportation of coal; and that the defendant likewise be enjoined, during any such period, from observing or enforcing its rules Nos. 8, 9 and 10, or any or either of said rules hereinabove referred to, which said Rules Nos. 8, 9 and 10 are as follows, to-wit:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. R'y Co.*, 12 I. C. C. 398, and *Trace* vs. *Chicago & Alton Railroad Co., et als.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

or any other rules, regulations or practices having the same or like effect; and that the defendant be ordered and directed to comply with the provisions of paragraph (12) of Section 1 of the said Act and, during any such period, to maintain and apply mine ratings to all of the mines served by the defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it; and that the defendant be enjoined, during any such period, from adopting or enforcing for any cause, reason or pretext whatsoever any rule, regulation or practice, which, or the result of which, will give to any mine, served by defendant, cars for transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or less than or different from the ratio of the total number of cars available on defendant's line for transportation of coal to the total rated capacity of all mines served by defendant.

And the plaintiff further prays that such other and

further relief be granted in the premises as equity and justice may require.

And may it please your Honor, to the end aforesaid, and on account of the irreparable loss and damage that will result to the plaintiff unless a temporary order is granted, to grant such temporary restraining order to remain in force until the hearing and determination of the application for a temporary injunction as hereinafter prayed, restraining said defendant, its agents and representatives, as aforesaid.

May it please your Honor that a temporary or interlocutory injunction pursuant to the foregoing prayer to remain in full force until the final hearing of this cause or until the further order of this court, be forthwith entered and granted against the defendant, its agents and representatives.

And may it please your Honor to grant unto the plaintiff the writ of injunction directed to said defendant perpetually restraining and enjoining it, its agents and representatives in manner and form aforesaid. And for this this plaintiff will ever pray.

LAMBERT RUN COAL COMPANY,
Plaintiff.

Rush C. Butler
Ernest S. Ballard
Frank E. Harkness
Of Counsel.

by John A. Howard,
Butler, Lamb, Foster & Pope,
its Solicitors.

STATE OF WEST VIRGINIA,
County of Marion,—ss:

Clarence D. Robinson, being duly sworn, on oath, deposes and says that he is Secretary & Treasurer of the above named Lambert Run Coal Company, the plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof; that the matters and things therein stated are true of his own knowledge except as to such matters as are alleged to be on information and belief and as to those he believes them to be true.

CLARENCE D. ROBINSON.

Subscribed and sworn to before me this 14th day of June, A. D., 1920.

IRA L. SMITH,
Notary Public.
Marion County, West Virginia.

My Commission expires Jan. 7, 1913.

EXHIBIT A.

THE BALTIMORE AND OHIO RAILROAD CO.
Coal & Coke Railway
Morgantown & Kingwood Railroad

Transportation Department

Equipment Circular—General Superintendent Transportation No. 4-C
.....Circular—Superintendent's No.....
Equipment
(Cancels Equipment Circular—General Superintendent Transportation No. 4-B)

These rules are a joint issue of the railroads whose names appear at the top and where the words "above named railroad" or "this railroad" appear in the rules they have reference to the railroad upon which the mine is located.

RULES GOVERNING THE RATING OF COAL MINES AND CAR DISTRIBUTION TO SUCH MINES

Effective April 16, 1920

RULES FOR RATING FOR CAR DISTRIBUTION PURPOSES COAL MINES, LOADING COAL AT MINE TIPPLES

The following rules shall govern the rating of coal mines as the basis for the distribution of empty cars to such mines:

(a) The daily capacity of each mine (other than mines covered by paragraphs b and c) shall be determined by taking the total coal tonnage shipped by the mine during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it.

(b) The daily capacity of a mine which is served jointly by or for two or more carriers (steam, electric, or water) shall be determined by taking the total tonnage shipped by the mine via all such carriers during the preceding month, dividing it by the number of hours worked in producing it (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more than 10 hours) of the individual mine. The result shall be termed the "gross daily rating" of such mine and shall be the basis on which cars shall be distributed to it; provided, that if track or other limiting conditions further restrict its ability to ship via above named railroad, such conditions shall be the limiting factor for the above named railroad's daily rating of such mine.

(c) The daily capacity of a mine delivering part of its output to a coking plant, to locomotives at the tipple, or to local trade shall be determined by taking the total coal tonnage shipped in railroad cars during the preceding month, dividing it by the number of hours worked (see paragraph e), and multiplying the quotient by the number of hours in the recognized workday (not more

than 10 hours) of the individual time. The result shall be termed the "daily rating" of such mine and shall be the basis on which cars shall be distributed to it.

(d) When the fires are withdrawn from part (or all) of the ovens at an operation coking part of its output, for the purpose of shipping coal production formerly used in charging ovens, the daily rating of the mine shall be increased to include the average tonnage per day so diverted in the previous month until the beginning of the next rating period, at which time the daily rating of the mine shall be determined in accordance with paragraph a or c, due allowance being made for such average tonnage so diverted in computing the new daily rating. A corresponding decrease of the mine's rating will be made when the ovens are again placed in blast.

When a mine that has been coking its entire output desires to ship coal and the fires are withdrawn from part (or all) of its ovens, it shall be given a daily rating for coal shipments corresponding to the average tonnage of coal formerly coked until the beginning of the next rating period, at which time the daily rating of the mines shall be determined in accordance with paragraphs a or c.

(e) In determining the number of hours worked in each day at a mine, time will be counted from the established time for beginning work (or the actual time if earlier or later than the established time) on the tipple until the dumping of coal finally ceases for the day, making deductions for the noon intermission when it is taken and for the time lost by reason of being blocked with loads, waiting for additional empty cars, or other railroad disability; provided, that if a greater number of hours is worked in the mine than on the tipple, the mine hours must be reported also, and the number of hours worked in the mine must then be used as the number of hours worked in producing the coal. (See paragraphs a, b and c.) Time may be deducted for railroad disability only when such railroad disability actually reduces the quantity of coal dumped that day. Time may be deducted when tipple is used for dumping coal into locomotives only when the tipple can not be simultaneously operated for loading cars.

(f) Daily ratings determined in accordance herewith will be revised monthly and made effective on the 10th of the month following the month's performance on which the rating is determined.

(g) If a mine be idle for a period of one full caledar month or more, the last rating determined will be the rating when work is resumed, provided the mine conditions be substantially the same as when the mine closed.

(h) Rating for development purposes based on current performance will be assigned to a new operation in previously undeveloped coal. A new mine will be furnished with a supply of cars sufficient to enable it to work freely in the course of development for a period not exceeding 6 months after shipments are begun; provided, that if theretofore its ability to load 150 tons per shift (not, however, to exceed 2 shifts per day) is established, it shall then be rated. A new operation of any other character shall be entitled to a development rating for a period of one month after shipments are begun.

(i) Each mine shall report on a prescribed form to the car distributor of the district promptly at the close of each day:

1. The number of hours in the recognized work day;

2. The established time for beginning the day's work;

3. Actual time work was begun this day on the tipple;

4. If the noon hour intermission is taken, how long;

5. Time lost during the day account:

Waiting for railroad cars or other railroad disability.....hours;
Strikes or mine labor shortage.....hours;
Mine disability. . .....hours;
No Market. . .....hours;
All other causes. . .....hours;

6. Time work on tipple ceased for today;

7. Number of hours worked today on the tipple,....; and in the mine, ... (See paragraph e);

8. Number of net tons of coal loaded for shipment via the above named railroad.

9. Total number of net tons of coal produced and shipped via each other outlet.

Joint mines shall furnish this daily report to each carrier serving them.

If, after notice from the railroad, an operator persistently fails to furnish this daily report, he will be penalized by curtailment of his car supply to the amount of 25 per cent. of distribution for one week.

(j) At the close of each month the mine manager or superintendent in charge of actual operation shall report under oath on a prescribed form to the General Superintendent of Transportation, B. & O. R. R. Building, Baltimore, Md., separately for each mine for each month, as follows:

1. Number of hours in the recognized work day;

2. Total number of net tons of coal produced;

3. Total number of net tons of coal shipped via the above named railroad;

4. Total number of net tons of coal shipped via each other outlet;

5. Total number of hours worked during the month. (See paragraph e.)

This report must be forwarded not later than the 3d of the month following that for which the statement is furnished; provided, that where the location of the mine makes it inconvenient to furnish a report under oath by that date, a report not under oath may be forwarded, and the sworn report forwarded not later than one week

after. Joint mines shall furnish this monthly report to each carrier serving them.

(k) If an operator declines or persistently fails to make reports or to make accurate reports to the carrier as required herein, it will be assumed that the mine worked full hours in producing and loading into railroad cars the tonnage shipped, and the daily rating will be computed accordingly.

(l) A statement showing the mine ratings which will govern the car distribution for the succeeding month will be furnished as soon as such ratings are ascertained to such coal miners on this railroad as make application for the same. Such statement will show the mine rating of each mine and the total mine ratings of each coal loading district and the aggregate ratings for all mines and all districts on this railroad, and the percentage of each such figure to the total.

RULES GOVERNING THE DISTRIBUTION OF CARS TO COAL MINE TIPPLES.

Whenever the available car supply in any region (or district) is such that all orders for cars can be filled, cars shall be placed at each mine in accordance with its daily order, except that whenever a mine holds unbilled coal loads, it shall be entitled only to empty cars equal in number to the difference between the rating last established for the mine and the number of unbilled coal loads so held. Whenever the available car supply is such that all orders for cars can not be filled, each mine shall be given its pro rata share of cars in accordance with the following rules:

1. The daily rating, or the daily order for cars if less than the rating, shall be the basis for car distribution.

2. Grouping of mines, or pooling of cars as between mines, will not be permitted.

3. On application of mine operators and in the discretion of the railroad, cars may be placed on such days

per cent. of its requirements, and its order shall be arbitrarily reduced to the number of cars furnished.

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. R'y Co.*, 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

11. If a mine receives more or less cars than it is entitled to during any period, as provided in Rule 6 (and after eliminating assigned cars as provided in Rule 9), it will be charged with a surplus or credited with a shortage accordingly, and the discrepancy adjusted as promptly as practicable.

12. A statement showing the car distribution for the preceding month will be furnished as soon as such distribution is ascertained, to such coal mines on this railroad as make application for the same. Such statement will show the car distribution of each mine, the total car distribution of each coal loading district, the aggregate distribution for all mines and all districts on this railroad, and the percentage of each such figure to the total.

W. G. CURREN,

General Superintendent Transportation.
Baltimore, Md., April 16, 1920.

(11) Notices of Petition for removal, with returns of service endorsed thereon, filed in open Court June 19, 1920, are in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA.

Lambert Coal Company vs. The Baltimore & Ohio Railroad Company.	In Chancery.

To Lambert Coal Company, Plaintiff:

You are hereby given notice that the defendant, The Baltimore and Ohio Railroad Company (in the proceeding in the above entitled cause called The Baltimore & Ohio Railroad Company) intends to file in the Circuit Court of Marion County, in the State of West Virginia, a petition and bond for the removal of the above entitled cause to the District Court of the United States for the Northern District of West Virginia; and that on the 19th day of June, 1920, said defendant will appear before the Honorable W. S. Hammond, Judge of said Circuit Court of Marion County, in the State of West Virginia, at the City of Fairmont, in the County of Marion, and State of West Virginia, and then and there present said petition and bond, and move said Court to accept said petition and bond and to approve said bond, and order the removal of said cause to said District Court of the United States. This notice is given to you as an ad-
(12) verse party prior to filing such petition and bond.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By GEO. M. HOFFHEIMER, Its Attorney.

HOFFHEIMER & TEMPLEMAN,
HENRY S. LIVELY,
Counsel for the Baltimore and Ohio

Railroad Company, Defendant and Petitioner.

Executed the witin notice, in Marion County, West Virginia, upon the within named Lambert Run Coal Co. on the 18th day of June, 1920, by delivering a true copy thereof in person to Dr. C. O. Henry, he being the President of said Corporation and a resident of said Marion County at the time of said service.

H. E. WOODWARD,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

Lambert Run Coal Company, a corporation, plaintiff,
vs.
The Baltimore and Ohio Railroad Company, a corporation, defendant. } In Chancery.

To Lambert Run Coal Company, a corporation, plaintiff, and Northern West Virginia Coal Operators Association, a corporation, intervening petitioner:

(13) You and each one of you are hereby given notice that the defendant, the Baltimore and Ohio Railroad Company, a corporation (in the proceeding in the above entitled cause called The Baltimore and Ohio Railroad Company) intends to file in the Circuit Court of Marion County, in the State of West Virginia, a petition and bond for the removal of the above entitled cause to the District Court of the United States for the Northern District of West Virginia; and that on the 19th day of June, 1920, said defendant will appear before the Honorable W. S. Haymond, Judge of said Circuit Court of Marion County, in the State of West Virginia, at the City of Fairmont, in the County of Marion, and State of West Virginia, and then and there present said petition and bond, and move said Court to accept said petition and bond and to approve said bond and order the re-

moval of said cause to said District Court of the United States. This notice is given to you as adverse parties prior to filing such petition and bond.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By HENRY S. LIVELY, Its Attorney.

HOFFHEIMER & TEMPLEMAN,
HENRY S. LIVELY,
Counsel for the Baltimore and Ohio Railroad Company, Defendant and Petitioner.

(14) Executed the within notice, in Marion County, West Virginia, upon the within named Lambert Run Coal Company, a corporation, on the 18th day of June, 1920, by delivering a true copy thereof in person to C. O. Henry, he being the President of said Corporation and a resident of said Marion County, at the time of said service.

T. V. BUCKLEY,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

Executed the within notice, in Marion County, West Virginia, upon the within named Northern West Virginia Coal Operators Association, a corporation, on the 18 day of June, 1920, by delivering a true copy thereof in person to Brooks Fleming, Jr., he being the president of said corporation, and a resident of said Marion County at the time of said service.

T. V. BUCKLEY,
Deputy for A. M. Glover, Sheriff of Marion County, West Virginia.

(15) Petition for removal filed in open Court, June 19, 1920, is in words and figures following:

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA.

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company. } In Chancery.

To the Honorable the Judge of the Circuit Court of Marion County, West Virginia:

Your petitioner, The Baltimore and Ohio Railroad Company (in the proceedings in the above entitled cause called The Baltimore and Ohio Railroad Company) respectfully represents that the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000); that the value of the alleged right sought to be protected or gained by the plaintiff.

In this cause exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000); that the value which your petitioner will lose, if the said plaintiff succeeds in this cause, exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000); and that this petition is filed prior to the time the defendant is required by the laws of the State of West Virginia or the rules of the Circuit Court of Marion County, in the (16) State of West Virginia, to answer or plead to the bill of complaint filed herein.

Your petitioner further represents that this cause is a suit of a civil nature between Lambert Run Coal Company, as plaintiff, and your petitioner, The Baltimore and Ohio Railroad Company, as defendant.

Your petitioner, further represents that said Lambert Run Coal Company, the plaintiff, was at the time of the commencement of this suit, and at all times since has been and still is, a corporation duly incorporated and existing under the laws of the State of West Virginia, having its principal office in the City of Fairmont, in the County of Marion, and State of West Virginia, and was at the time of the commencement of this suit, and at all times since has been and still is, a resident and citizen of the State of West Virginia; that your petitioner, The Baltimore and Ohio Railroad Company, defendant, was at the time of the commencement of this suit, and at all times since has been and still is, a corporation duly in-

corporated and existing under the laws of the State of Maryland, having its principal office in Baltimore City, in said State of Maryland, and was at the time of the commencement of this suit, and at all times since has been and still is, a resident and citizen of the State of Maryland; that said Lambert Run Coal Company was not, at the time of the commencement of this suit, nor at any time thereafter, nor is it, a resident or citizen of any other State or place than said State of West Virginia; and that said The Baltimore and Ohio Railroad Com-
(17) pany was not, at the time of the commencement of this suit, nor at any time thereafter, nor is it, a resident or citizen of any other State or place than said State of Maryland.

Your petitioner further represents that this suit arises under the laws of the United States, to-wit: The Act to Regulate Commerce, approved February 4, 1887, as amended, and the "Transportation Act, 1920", approved February 28, 1920; that the alleged right of the plaintiff is based on, the correct decision of said suit necessarily involves and depends on, the construction of said Act to Regulate Commerce, as amended, and said "Transportation Act, 1920", and especially section 402 (10), (11), (12), (13), (14), (15), (16), and (17) of said "Transportation Act, 1920."

Your petitioner further represents that the Rule No. 8 in the bill of complaint mentioned, and from the observance and enforcement of which your petitioner is thereby sought to be enjoined was made, and was and is observed and enforced by your petitioner, under and in pursuance of, and in obedience to an order of the Interstate Commerce Commission of the United States, which order was issued by said Commission on the 15th day of April, 1920, a copy of which order is hereto annexed, made part hereof and marked "Petitioner's Exhibit A"; and the authority for said order was and is set forth in a report by said Commisison to the Sen-
(18) ate of the United States, a copy of which report is hereto annexed, made part hereof and marked "Petitioner's Exhibit B", that the said Rule No. 8 is in substance and fact an order of said Commission, and not a mere rule or regulation of your petitioner; that the validity, force and effect of said order of said commission, and of

said Rule No. 8 and of Rules Nos. 9 and 10 in the bill of complaint mentioned, and from the observance and performance of which your petitioner is hereby sought to be enjoined, necessarily involve and depend on, the construction and effect of said Act to Regulate Commerce, as amended, and said "Transportation Act, 1920", and especially section 402 (10), (11), (12), (13), (14), (15), (16) (17) of said "Transportation Act, 1920"; and that as your petitioner is informed and believes and therefore avers, all of the assignment and distribution of cars for the transportation of coal by your petitioner since the 16th day of April, 1920, was, has been and is in accordance with said statutes, said order of said Commission and said Rules Nos. 8, 9 and 10.

Your petitioner further represents that the object, purpose and effect of this suit and of said bill of complaint are in substance and in fact, to enjoin, set aside, annul and suspend the said order of the said Interstate Commerce Commission.

(19) Your petitioner further represents that the residence of the plaintiff, Lambert Run Coal Company, was at the time of the commencement of this suit, and at all times since has been and still is in the Northern District of West Virginia; that the said plaintiff had at the time of the commencement of this suit, and at all times since has had, and still has, its principal office and its operating office, in said Northern District of West Virginia; and that the matter complained of by the said plaintiff did and does arise in said Northern District of West Virginia.

Your petitioner has made and herewith files a bond, with good and sufficient surety, for its entering in the District Court of the United States for the Northern District of West Virginia, within thirty days from the date of filing this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by the said District Court if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Written notice of the defendant's intention to file this petition and bond for removal was given the said plaintiff by the defendant, your petitioner, prior to filing the same, and was also given to Northern West Virginia Coal Operators Association, which, on the 17th day

of June, 1920, caused to be served on your petitioner a notice that it would present a petition of intervention in this suit, which notice is hereto annexed made part hereof and marked "Petitioner's Exhibit C", but which petition of intervention has not been presented or filed. (20) And your petitioner prays this Honorable Court to proceed no further herein, except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said District Court of the United States for the Northern District of West Virginia, and it will ever pray.

THE BALTIMORE AND OHIO RAILROD COMPANY,
By GEO. M. HOFFHEIMER, Its Attorney.

A. HUNTER BOYD, JR.,
H. R. PRESTON,
HOFFHEIMER & TEMPLEMAN,
HENRY S. LIVELY,
Counsel for the Baltimore and Ohio Railroad Company, Defendant and Petitioner.

STATE OF WEST VIRGINIA,
(21) County of Marion, to-wit:

Geo. M. Hoffheimer, being duly sworn, on his oath, says that he is the Attorney of The Baltimore and Ohio Railroad Company, a corporation, the petitioner named in the foregoing petition; that he has knowledge of the facts and allegations in said petition contained and is duly authorized to make this affidavit for and on behalf of said petitioner; that the facts and allegations in said petition contained are true, except so far as they are therein stated to be on information; and that so far as they are therein stated to be upon information he believes them to be true.

GEO. M. HOFFHEIMER.

Taken, subscribed and sworn to before me this 19th day of June, 1920.

CLARENCE CURREY,
Clerk of the Circuit Court of Marion County, West Virginia.

(PETITIONER'S EXHIBIT A.)

INTERSTATE COMMERCE COMMISSION
(22) Washington.

April 15, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, vs. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co.*," assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce act, as amended by Section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16,

(23) 1920, and until the further direction or order of the commission.

By the Commission:

GEORGE B. McGINTY, Secretary.

A True Copy:

GEORGE B. McGINTY, Secretary.

(PETITIONER'S EXHIBIT B).

(24) June 11, 1920.

IN RE ASSIGNMENT OF FREIGHT CARS.

By Senate Resolution No. 376 the Interstate Commerce Commission was directed to inform the Senate upon what authority, if any, its order of April 15, 1920, entitled "Notice to carriers and shippers" was issued.

Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars and cars for the carrier's own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. In other words, all such cars were given to the mines for which they were intended and such mines were given in addition their full share of the cars available for distribution. This practice was complained of as unreasonable and unduly prejudicial and in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, decided July 11, 1907, the Commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the

mine to which given it should be given additional cars only sufficient to make up its distributive share.

In the report in this case it was pointed out that in *U. S., ex rel Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 165 Fed. 113, a similar decision was made as to private cars and a contrary decision as to foreign railway fuel cars, but that in *Logan Coal Co.* v. *Penn. R. R. Co.*, 154 Fed. 497, it was held that such foreign railway fuel cars should be counted against the mines to which they were consigned.

Among other considerations mentioned in the Commission's report was the fact that a railroad company would not send its cars on to the lines of another railway company even for its own fuel supply if they were to be diverted from that intended use and distributed among others than those to whom they were consigned for loading to various destinations on the lines of other carriers, thus rendering the fuel supply of the carrier sending the cars uncertain and depriving it of the use of its equipment.

In *Traer* v. *Chicago & Alton R. R. Co., et al.*, 13 I. C. C. 451, decided April 13, 1908, the same questions were presented that had been presented in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., Supra*, and the additional question of the reasonableness of the carrier's failing to count (25) against the mines to which they were delivered cars for loading with its own railroad fuel. The Commission followed the decision in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*, and in addition held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from which such fuel supply is received, but that if such mine or mines also ship commercial coal fuel cars so supplied must be counted against the mine or mines under the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra.*

In this case it was said that if a contract for fuel covers such supply as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel even though it thereby deprived shippers of desired use thereof; that this right to so use its cars did not rest

upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor considerations of public policy which recognized the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and the public. Recognizing the right of the carrier to secure its fuel supply either from mines which it owns or those the entire output of which it purchases, it was held that where the carrier purchases a portion of the output of a mine which is also producing commercial coal it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnished to that mine for its own fuel.

In *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I C. C. 86, decided June 2, 1908, the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra.*, was again followed, and it was said that the ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; that the ownership of a private car or the possession of a foreign railway fuel car gives to a coal operator no preferred right to have it occupy a carrier's sidings or tracks as against a system car loaded by another operator, or to have it handled in trains in preference to a system car, and that when any of these general facilities are insufficient to move all the traffic offered no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines.

In *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 435, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commis-
(26) sion in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*, and in *Tracy* v. *Chicago & Alton R. R. Co., supra*, and held that the act to regulate commerce delegated to the Commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means

of prohibiting undue preferences and unjust discriminations.

In *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, 19 I. C. C. 356, decided March 7, 1910, the above decision of the Supreme Court was referred to in pointing out that the orders of the Commission with respect to the distribution of coal cars by interstate carriers remained unaffected by attacks that had been made upon them in the courts, and that further consideration of these questions in connection with this group of cases had confirmed the conviction that the general principles underlying the disposition made of previous cases were both sound and just. The rule applied by the carrier in the *Hillsdale case* was described, its effect was explained, and it was condemned as giving undue advantage in distribution to certain mines and as contrary to the previous decisions of the Commission. In a supplemental report in this case, 23 I. C. C. 186, reparation was awarded for damages resulting from the discrimination which had been practiced and found.

In *Penna. R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, decided June 21, 1915, the Commission's award of reparation in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, *supra*, was sustained by the Supreme Court notwithstanding the fact that in action had been brought in a State Court on the same subject before the Commission had made its reward of reparation. The Supreme Court held that where a complaint involved practices of carriers in distributing cars for interstate shipments no action is maintainable in any Court for damages alleged to have been inflicted thereby until the Commission has made a finding as to the reasonableness of such practices.

In the Commission's report of June 9, 1914, to the Senate and House of Representatives in *Coal and Oil Investigation*, 31 I. C. C. 193, it said at page 218:

As to actual distribution of cars in accordance with the relative ratings of the mines, the opinion of the Commission is clearly set forth in *Trear* v. *C. & A. R. R. Co.*, 13 I. C. C. 451, and it was sustained by the Supreme

Court of the United States in 215 U. S. 452 and 479. Formerly few of the roads counted against the mine ratings company fuel cars (i. e., cars to be loaded with the carrier's own fuel); private cars (i. e., cars owned or leased by coal companies); or foreign consigned cars (i. e., car delivered by foreign coads for loading at particular mines.) In the case just cited, the Commission ruled that (27) all three classes of cars should be counted against the ratings as well as those furnished for commercial loading. In cases where the carrier takes the entire output of a mine, however, it has been considered permissible to deduct the number of cars delivered to that mine from the available supply before prorating among mines shipping commercial coal, or both commercial and railroad coal.

The Rule of law on this subject thus established remained the controlling rule for carriers generally, and apparently without friction or controversy, until during the war and under the rules of the Fuel Administration, including its zoning system, and while the roads were under federal control, the rule was changed and the use of assigned cars for loading with railroad fuel was abandoned. This change was followed by the imperative necessity of railroads resorting to confiscation of coal in transit in order to keep their roads in operation. In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel.

When federal control terminated that was in effect on all roads under federal control a set of rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association, and in order that there might not be confusion because of different lines of action being followed by different individual roads the Commission on March 2, 1920, issued a notice to carriers and shippers recommending that until experience and study demonstrated that other rules would be more effective and beneficial the uniform rules as contained in the Railroad Ad-

ministration's Car Service Section Circular CS-31 (Revised) be continued in effect.

With the suspension of the activities of the Fuel Administration and regulations which he had prescribed some railroads, that did not have more than two or three days' supply of coal and that were and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mines were sued for damages on account of such confiscation, injunctions were brought in State courts against the practice of confiscation, and when it was learned that the carriers were contemplating return to the use of assigned cars in injunctions were sought in State courts against the same carriers restraining them from using assigned cars. Numerous informal conferences were had between the Commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carrier could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A con-
(28) ference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestions to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply.

Rule 8 of the Railroad Administration's rules which the Commission had recommended be adhered to until experience and study demonstrated that some other rules would be more effective and beneficial was as follows:

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

It will be noted that under this rule private cars, some of which are owned and used by coal operators, and

cars assigned to the mines by the Car Service Section of the Railroad Administration for railroad fuel or for other purposes were designated and treated as "assigned" cars. All other cars were designated and treated as "unassigned" cars.

Rules 9 and 10 of the Railroad Administration's rules were as follows:

9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rate share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rate share, based on a revised percentage it shall be entitled to receive unassigned cars in addition thereto to make up its pro rate share.

It will be noted that under these rules the "assigned" cars were treated in the same manner as railway fuel cars were treated under the Commission's decisions in the cases hereinbefore cited.

Under the conditions that have been briefly outlined the Commission on April 15, 1920, changed its rec-
(29) ommendation of March 2, 1920, and recommended that until further experience and study demonstrated that other rules will be more effective and beneficial the Railroad Administration's rules be continued in effect except that rule 8 should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Tracy* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission also expressed the opinion that an

emergency existed requiring immediate action and in the exercise of the authority conferred by paragraph (15) of Section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, it suspended the operation of the then existing rule 8 and directed the observance of rule 8 modified as above, effective April 16, 1920, and until further direction or order of the commission.

Paragraph (12) of Section 1 of the interstate commerce act, as amended by Section 401 of the Transportation Act, 1920, declares it to be the duty of every carrier by railroad to make just and reasonable distribution of cars for the transportation of coal among the coal mines served by it whether located on its line or lines or customarily dependent upon it for car supply, and to maintain and apply just and reasonable ratings of such mines during any period when the supply of cars available for such service does not equal the requirements of the mines, and to count each and every car furnished to or used by any such mine for transportation of coal against the mine, and provides a specific penalty for failure or refusal to comply with these requirements.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 400 of the Transportation Act, 1920, provides that charges made for any service rendered or to be rendered by carriers subject to the act shall be just and reasonable. The act does not attempt to define in detail what is a just and reasonable rate, fare or charge, or what is a just and reasonable distribution of cars or rating of mines. The Commission is authorized to determine what is a just and reasonable charge for transportation or what are just and reasonable rules for distribution of cars or rating of mines.

Paragraph (15) of Section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, authorizes the Commission whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action ex-
(30) ists in any section of the country, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission, and to make such just and reasonable directions with respect to car

service as in its opinion will best promote the service in the interest of the public and the commerce of the people. The Commission's direction of April 15, 1920, was issued under authority of that paragraph.

The Commission is of opinion that paragraph (12) of section 1 of the interstate commerce act does not change the rule of law laid down in the *Hocking Valley* and *Tracy cases, supra*. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States.

No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the Commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under federal control and the production distribution and marketing of coal was under a war time federal administration. The passing of the roads from federal control and the suspension of the operation of the Fuel Administration's rules, together with the transportation conditions and shortage of fuel on hand, created an emergency in which the Commission acted in accordance with its best judgment. Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adapted to their uses which can fairly be substituted for the rules to which some objections have been made. No one has suggested such a substitute rule. The nearest approach to it has been an expressed belief that a form of preferential contract could be devised under which the contracting railroad would have first call upon the output of a mine but so far as we are advised no such form of contract has been framed. It seems not inappropriate to say that the coal operators are not able to entirely agree among themselves as to the advantages or disadvantages of the assigned car practice.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the Transporta-

tion Act, 1920, authorizes the Commission to direct priorities in transportation. If priorities were to be prescribed in transportation of bituminous coal it would obviously be necessary to give first priority to that for railway fuel, as was done when priorities were issued by the President's priority agent during the war.

(31) Copies of United States Railroad Administration's Car Service Section Circular CS-31 (Revised) and of the Commission's direction of April 15, 1920, are appended hereto and made a part hereof.

(PETITIONER'S EXHIBIT C).

IN THE CIRCUIT COURT OF MARION COUNTY,
(32) WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
Baltimore & Ohio Railroad Company, Defendant.
In Equity. No. ———

NOTICE.

To the Defendant:

Please take notice that on the 19th day of June, 1920, at ten o'clock in the forenoon, or as soon thereafter as the matter may be heard, the Northern West Virginia Coal Operators Association, a Corporation, wiill present its petition in the above styled cause to the Honorable W. S. Haymond, Judge of said Court, in chambers at the Court House at Fairmont, West Virginia, praying that it may intervene in the said suit and that an order may be entered making it a party thereof.

NORTHERN WEST VIRGINIA COAL
OPERATORS ASS'N,
By GEO. T. BELL.

(33) The Removal Bond filed in open Court June 19, 1920, is in words and figures following:

Know all Men by These Presents,

That we, The Baltimore and Ohio Railroad Company, a Corporation, as principal, and National Surety Company, a Corporation, as surety, are held and firmly bound unto Lambert Run Coal Company, a Corporation, in the penal sum of One Thousand Dollars, to the payment whereof well and truly to be made unto the said Lambert Run Coal Company, its successors, representatives and assigns, we bind ourselves, our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Whereas, The Baltimore and Ohio Railroad Company has filed its petition in the Circuit Court of Marion County, in the State of West Virginia, asking for the removal to the District Court of the United States for the Northern District of West Virginia of a certain cause, wherein Lambert Run Coal Company is plaintiff, and the Baltimore and Ohio Railroad Company is defendant.

Now, the Condition of the Above Obligation is Such, that if the said The Baltimore and Ohio Railroad Company shall enter in the said District Court of the United States for the District aforesaid, within thirty days from the date of filing said petition, a certified copy of the record in said suit, and well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was improperly removed thereto, and shall do and perform all acts (34) required by the laws of the United States to be done by it in the removal of said suit as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue.

In Testimony Whereof, the said The Baltimore and Ohio Railroad Company hath caused this bond to be duly executed by George M. Hoffheimer, its Attorney in fact, and said National Surety Company, by Henry S. Lively, and F. E. Nichols, its Attorneys in fact, hath hereto set its hand and seal on the nineteenth day of June, 1920.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By GEORGE M. HOFFHEIMER, Seal
Attorney-in-fact.

NATIONAL SURETY COMPANY,
By HENRY S. LIVELY.
By F. E. NICHOLS,
Its Attorneys-in-fact.

STATE OF WEST VIRGINIA,
(35) County of Marion, ss:

I, Clarence Currey, Clerk of the Circuit Court in and for the County of Marion, in State aforesaid, hereby certify that the foregoing are true and correct copies of all papers filed, and all orders entered by said Circuit Court in the Chancery cause of Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railorad Company, Defendant, as taken from the records and papers on file in my office.

Given under my hand and the seal of said Court this 21st day of June, 1920.

CLARENCE CURREY,
Clerk of Circuit Court of Marion County, West Virginia.

Taxation of cost, 26.40
Clerk's Fee for Transcript, $14.50

(Seal)

ORDER DOCKETING RECORD FROM CIRCUIT COURT OF MARION CO.

(36) Entered June 29, 1920.

Lambert Run Coal Company
v.
The Baltimore & Ohio Railroad Company. } In Equity.

This day came the defendant, The Baltimore & Ohio Railroad Company, by H. R. Preston, A. Hunter Boyd, Jr., and Hoffheimer & Templeman, its counsel, and tendered and asked leave to file the transcript of record of the Circuit Court of Marion County, West Virginia. On consideration whereof it is ordered that said transcript of record be, and the same is hereby, filed, and that this cause be, and the same is hereby, docketed at Philippi.

AFFIDAVIT OF SAMUEL D. BRADY.

In the Circuit Court of Marion County,
State of West Virginia.

Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.	In Equity No. ——

State of West Virginia,
(37) Marion County, ss:

This day personally appeared before me, the undersigned, a Notary Public in and for the County and State, aforesaid, Samuel D. Brady, who by me duly first sworn, deposes and says:

That affiaint is the President of Osage Coal Company, a mining corporation created and existing under the laws of the State of West Virginia; that said company is engaged in producing bituminous coal and that its mines are situation in Monongalia County, West Virginia, on the railroad line of the Morgantown & Wheeling Railway Company which is being operated under a receivership; that said railroad extends from Morgantown, West Virginia, for a distance of about thirty (30) miles to the village of Brave, in the State of Pennsylvania, and is a common carrier engaged in the transportation of freight and passengers by continuous carriage or shipment wholly by railroad between different points in the State of West Virginia and other points in the different States of the United States; that said railroad has a physical connection at Randall, in said Monongalia County with the railroad line of the Monongahela Railway Company, and between Randall and said village of Brave, is operated as a steam railroad and does not have a physical connection with any line of railroad other than the line of said Monongahela Railway Company at Randall.

Affiant further says that said Monongahela Railway Company operates a line of railroad extending from Brownsville, Pennsylvania, to Fairmont, West Virginia, along the west bank of the Monongahela river, a distance

of approximately sixty-nine (69) miles; that said Monongahela Railway Company is a railroad corporation, created and existing under the laws of the State of Pennsylvania and is a common carrier in the transportation of freight and passengers by continuous carriage wholly by railroad between different points in the States of (38) West Virginia and Pennsylvania and other points in the different States of the United States; that the railroad of said Monongahela Railway Company has physical connections at West Brownsville Junction in Pennsylvania with the railroad of Pennsylvania Railroad Company and the railroad of Pittsburgh & Lake Erie Railroad Company, and upon information and belief that the lines and property of said Monongahela Railway Company are owned jointly and in equal interests by Pennsylvania Railroad Company and New York Central Railroad Company or come of its underlying companies, and are at this time being operated by interests which are owned and controlled by the New York Central Railroad Company and Pennsylvania Railroad Company.

Affiant further says that neither the Morgantown & Wheeling Railway Company nor Monongahela Railway Company has any coal cars of its own and that each of said companies is customarily dependent upon said Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railriad Company and New York Central Railroad Company for its coal car supply; that the mines of Osage Coal Company are situated at or near Osage, West Virginia, on the railroad line of said Morgantown & Wheeling Railway Company only, about one (1) mile from said Randall; that between said Randall and the village of Cassville on the said railroad and within distance of four (4) miles, there are twenty-six (26) operating coal mines (twenty-two of which are given mine ratings by said Morgantown & Wheeling Railway Company), situated on said railroad line including the mines of said Osage Coal Company; that the coal mined by said company is substantially of the same quality and character and is mined and shipped under substantially similar circumstances and conditions, physical and otherwise as exist throughout the said mining district between said Randall and Cassvile, and that the logical market for said coal is the same as that for other coal mined in said dis-

trict and coal produced from mines on said Monongahela Railway.

Affiant further says that said Monongahela Railway Company, its said owners and connections, receive the coal produced at the mines of Osage Coal Company for shipment to points on their respective lines and to various points on connecting railroad lines and for shipment to various other points in the different States of the United States; that said Osage Coal Company is prepared and equipped to produce, ship and sell its coal in the various markets of the United States reached by the railroad lines of said Morgantown & Wheeling Railway Company, Monongahela Railway Company and its said (39) owners, Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railroad Company and the New York Central Railroad Company and their Railroad connections to the amount of one thousand (1,000) tons per day and that the railroad of said Morgantown & Wheeling Railway Company in connection with the lines of said Monongahela Railway Company, Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railroad Company and New York Central Railroad Company is the only outlet or means of shipment or transportation from said mines.

Affiant further says that for many months last past there has existed and now exists an acute shortage of coal cars on the railroad of said Morgantown & Wheeling Railway Company, and that as a result thereof the said mines of said Osage Coal Company have been operated since January 11, 1920, to no more than approximately 25 per sent of their capacity as rated by said Morgantown & Wheeling Railway Company; that affiant has read and knows the content of the bill of complaint filed in the above entitled cause and says that the facts therein set forth with reference to the results and effect of coal car shortage and of assigning cars during coal car shortage periods are true.

Affiant further says that said Morgantown & Wheeling Railway Company has established and maintains mine ratings for the said 22 mines located on its line and that the following table shows for the periods indicated therein the percentage of cars available for coal loading on the line of said Railway based upon its said ratings of

said mines for said periods respectively, also the percentage of coal cars furnished by said railway company during said periods to the mines of said Osage Coal Company and to four other mines belonging to and operated by other coal mining companies located on the line of said Railway; that all of said mines shown in said table are served by said Railway Company only and are entirely dependent upon it for car supply, and that all of the mines included in said table other than the mine of the said Osage Coal Company have been receiving assigned cars during all the time covered by said table but in less proportion prior to the month of April, 1920, than during and since said month, but that said mines of said Osage Coal Company have not during any of the time covered by said table receiveed any assigned car or cars whatsoever:

(40) #4—SS.

Morgantown and Wheeling Railway Company	Percentage received for period Jan. 11 to Feb. 10, 1920, inclusive	Percentage received for period Feb. 11 to March 10, 1920, inclusive	Percentage received for period March 11 to April 10, inclusive	Percentage received for period April 11 to May 10, inclusive	Percentage received for period May 11 to June 10, inclusive
Morgantown & Wheeling Railway mines	43.70	30.46	45.20	29.05	27.76
Osage	39.94	26.96	41.08	12.24	16.50
Cleveland and Morgantown, No. 2	38.90	33.11	66.68	44.13	51.50
Berry	52.30	32.28	57.76	44.18	43.01
Mammoth	46.15	30.93	55.82	73.27	39.64
Chaplin	55.93	23.55	51.62	48.53	45.54

And further affiant sayeth not.

SAMUEL D. BRADY.

Taken, subscribed and sworn to before me in Marion County, State of West Virginia, this 18th day of June, 1920.

TUSCA MORRIS,
Notary Public for Marion Co., W. Va.

My Commission expires December 23, 1929.

AFFIDAVIT OF BROOKS FLEMING, JR.

WEST VIRGINIA.
IN THE CIRCUIT COURT OF MARION COUNTY,

Lambert Run Coal Company, Plaintiff; vs. The Baltimore and Ohio Railroad Company, Defendant.	In Equity. No. ———

STATE OF WEST VIRGINIA,
(41) Marion County, ss:

This date personally appeared before the undersigned Notary Public, Brooks Fleming, Jr., who being first duly sworn, says upon his oath:

That he is a resident of the City of Fairmont, in the State aforesaid, and has resided in said City of Fairmont for the last thirty-six (36) years; that continuously from the year 1906 up to the present time he has been and still is engaged in the coal mining business, and during all of said period has been connected with the Consolidation Coal Company, which owns and operates a large number, to-wit, eighty-one mines located in the States of West Virginia, Maryland, Pennsylvania and Kentucky, and that during all of the past sixteen years said The Consolidation Coal Company has owned and operated a large number of mines, lying in some or all of the said States; that said mines are located on various lines of Railroad including the Baltimore and Ohio Railroad Company, defendant above named; that fifty-one of said mines now owned and operated by the said The Consolidation Coal Company are located on the lines of the defendant, Baltimore and Ohio Railroad Company; that affiant has been active in the operation of various mines belonging to the said The Consolidation Coal Company as day laborer, foreman mine superintendent, assistant manager of the West Virginia Division of said coal Company which included within its jurisdiction a large number of mines, Assistant General Manager of said Com-
(42) pany, in which position he had to do with the operation of eighty-one mines; and that at the present time affiant is Assistant to the President of the said The

Consolidation Coal Company and is thoroughly familiar with the operation of the mines of said Coal Company, and the relationship of said mines to the carriers and has had a large experience in the operation of said mines during car shortage period and knows the effect upon the property, business, good will and employees of the company occasioned by car shortage and assigned cars; that the Northern West Virginia Coal Operators' Association is a voluntary corporation, organized and existing under and by virtue of the laws of the State of West Virginia, its principal office located in the City of Fairmont, County and State aforesaid; that affiant is President of said Association and is duly authorized by said Association to make this affidavit on its behalf as its President; that among the objects and purposes for which said Association is formed is the following: "The establishment and maintenance of proper relations between common carriers and coal producing companies, the procurement of an adequate car supply and the equitable distribution thereof, and the ascertainment of facts and the compilation and distribution of data and statistics relating to railroad transportation affecting production;" and that the activities of this affiant and of the said Association in this behalf are undertaken in accordance with the said objects and purposes of said Association.

Affiant also states that he is familiar with the practice of assigning cars fully set forth in bill of complaint to be filed herein; that affiant has read and knows the contents of said bill of complaint and knows the facts set forth therein are true, except those facts therein said to be upon information and belief and the facts therein alleged which have to do with the property and business of the plaintiff, as to which facts affiant believes them to be true; that affiant is familiar with the mining property (43) belonging to the plaintiff and described in the bill of complaint filed herein.

Affiant says that the following are some of the injuries and injustices occasioned by the assigned car: The assigned car prevents equal distribution of transportation facilities among all coal operators, thus penalizing operators not having contracts subject to assigned cars and causing them loss in the following particulars,

Their production is reduced, resulting in higher cost of production per ton of coal.

The assigned car in many cases prevents the coal operator not having contracts that can be filled by the use of assigned cars from carrying out said contracts with his customers, which results in injury to his reputation and business and loss of business standing.

The assigned car produces unrest and discontent among the miners in those mines not enjoying the use of assigned cars, resulting in men leaving such mines to the loss and injury of the operator and great damage to his business.

The assigned car also occasions heavy expense in endeavoring to secure new miners, and takes from the mines those men most desirous of working full time and earning good wages. During acute car shortage periods when assigned cars are used to the greatest extent, miners employed at mines not enjoying assigned cars are unable to make sufficient wages to afford themselves and families a decent living.

And further affiant sayeth not.

BROOKS FLEMING, JR.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 15th day of June, 1920.

A. E. THURNES,
Notary Public.

My Commission expires July 28, 1929.

AFFIDAVIT OF CLAUDE M. STUBBINS.

IN THE CIRCUIT COURT OF MARION COUNTY,
STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.	In Equity No. ———

STATE OF WEST VIRGINIA,
Marion County, ss:

This 14th day of June, 1920, personally appeared before the undersigned Notary Public, Claude M. Stubbins, who being first duly sworn, says, upon his oath:

That he is a resident of the City of Fairmont, County and State aforesaid, and is employed by the Northern West Virginia Coal Operators' Association as Chief Clerk; that in the performance of his regular duties he obtains from a large number, to-wit, thirty (30) bituminous coal operators owning and operating, to-wit, sixty-nine (69) mines located on the lines of the defendant and the Western Maryland Railroad Company in Marion County, Taylor, Harrison and Barbour County, State of West Virginia, daily reports showing the cars received, loaded and left over on each day at each of the said mines and also the number of cars desired by each of the said mines for loading on the following day; that by arrangements made between the agent of the defendant having in charge defendant's coal car distribution in this territory and living in the City of Grafton, Taylor County, West Virginia, and the officers of the said Northern West Virginia Coal Operators' Association, the coal operators above mentioned make their said daily reports to this affiant with reference to requirements of said operators for cars for the following day instead of making those reports direct to the agent of the defendant at Grafton and that affiant thereupon daily, after receiving said reports from said operators, communicates with the said agent of the defendant at Grafton and advises said agent of the requirements of said coal operators as aforesaid; that affiant became connected with said Northern West Virginia Coal Operators' Association on the 15th day of February, 1920, when he found the practice above described in affect and has continued to make said reports daily since said date.

(45) Affiant further says that the defendant customarily publishes monthly bulletins having to do with the distribution of cars for coal loading and mine ratings and that said bulletins are usually received by affiant and coal operators requiring them about the 20th day of the month of issue; that the current number of said bulletin

issued by the defendant for its Eastern Lines is called "Bulletin No. 4", and is entitled "Distribution of Cars for Coal Loading, April, 1920, and Mine Ratings Effective May 10, 1920", and is dated Baltimore, Md., May 15th, 1920, and bears the name "W. G. Curren, Gen'l Sup't Transportation"; that said bulletin is printed and distributed by defendant to and among coal operators and others; that the ratings therein shown as effective May 10, 1920, continued in effect in accordance with the regulations and practices of the defendant until and including the tenth (10th) day of June, 1920; that the similar circular of the defendant giving the distribution of cars for coal loading in May, 1920, and the mine ratings in effect June 10, 19201, has not yet been received by affiant; that the mine ratings shown by the bulletins of defendant very but little from month to month, and that the ratings shown in the said "Bulletin No. 4", are approximately the same as the ratings for the said mines which became effective June 10th, 1920; that the daily rated capacity of all the mines located within the jurisdiction of said agent at Grafton as shown by said "Bulletin No. 4" is 1559.1 cars, and that the rating shown by said "Bulletin No. 4" of the Rachel Mine of the Consumers Fuel Company, located on and served exclusively by the defendant's line and within said jurisdiction, at Downs, Marion County, State of West Virginia, is 43.1 cars, and that the ratings for said mine on the 12th day of June, 1920, was according to the best of the knowledge and belief of this affiant, approximately 43.1 cars; that on said day, affiant was advised by the agent of said Rachel Mine, who was then making his regular daily report as such agent to this affiant, that the defendant on said day had placed at said Rachel Mine for loading from its tipple and storage 83 cars, 75 of which were consigned to the defendant and 8 of which were consigned as commercial coal to other consumers.

That in accordance with arrangements made between the said Northern West Virginia Coal Operators' Association and the defendant's said agent at Grafton, West Virginia, said agent at Grafton reported to affiant on Saturday, June 12, 1920, that 744 coal cars were on said (46) date in the region under the jurisdiction of the said agent at Grafton and that 664 of said cars had been, at

or prior to 7 o'clock A. M. on that day, placed for loading at mines served by the defendant under the jurisdiction of said agent; that eliminating the number of assigned cars loaded by defendant within said jurisdiction on said date, the car supply in said jurisdiction available for commercial loading on said date was approximately 11 per cent of the rated capacity of the mines located on defendant's line within said jurisdiction; that on said date two mines belonging to the Jamison Coal and Coke Company, located at Downs, West Virginia, within said jurisdiction and on the lines of the defendant and served by it only, having rated capacities respectively according to said "Bulletin No. 4" of 10.8 cars and 12.7 cars per day, received no car or cars for coal loading and that the requirements of each of said mines for said day, which requirements had been duly previously reported by affiant to said agent of the defendant at Grafton, were for cars up to the full rated capacity of said mines respectively.

And further affiant sayeth not.

CLAUDE M. STUBBINS.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 14 day of June, 1920.

J. BLAINE MOORE,
Notary Public for Marion County, West Virginia.

My Commission expires Aug. 15, 1927.

AFFIDAVIT OF CLETUS H. JENKINS.

(47) IN THE CIRCUIT COURT OF MARION COUNTY, STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore & Ohio Railroad Company, Defendant.
In Equity No. ———

STATE OF WEST VIRGINIA,
County of Marion, ss:

This 15th day of June, 1920, personally appeared before me the undersigned Notary Public, Cletus H. Jenkins, who being first duly sworn, says upon his oath:

That he resides in the City of Fairmont, county and State aforesaid, and that for more than twenty-three (23) years last past he has resided in the said City of Fairmont and has been engaged in the business of operating coal mines and selling the product thereof; that he is Vice-President of the Logan Mining Company operating bituminous coal mines in Logan County, State of West Virginia, and Secretary and Treasurer of the Hutchinson Coal Company operating bituminous coal mines in Harrison and Mason Counties, State of West Virginia, and Belmont County, State of Ohio; that in the year 1918 the Northern West Virginia Coal Operators' Association was organized and immediately upon its organization affiant became President of said Association, which position he occupied for more than one year; that in his experience in the coal business he has worked in the mines and on the surface and has engaged both in the operating and selling end of the business; that for many years he has been and now is familiar with the relationship between supply of cars for the transportation of coal and the operation of the mines dependent upon such car supply; that there has been a coal car shortage on the lines of the defendant, The Baltimore and Ohio (48) Railroad Company, during a considerable portion of each calendar year beginning with the year 1916 up to and including the present time; that during the years 1916 and 1917 and up until about the 25th day of May, 1918, the said defendant made a practice of assigning coal cars to certain mines substantially in accordance with the provisions relating to assigned cars contained in Exhibit "A" attached to the bill of complaint filed herein and made a part of said bill; that beginning on or about April 16, 1920, the said defendant again resumed the practice of assigning cars; that the result of this practice is to give to the mines receiving the assigned cars a larger percentage of cars for the movement of coal on each car shortage day on which assigned cars are placed

at said mine than said mine would receive were cars distributed to all mines in proportion to the respective ratings of said mines; that a further result of the practice of assigning cars is to deprive mines that do not receive assigned cars of their full proportion, based upon their respective ratings, of the cars available on each and every day on which cars are so assigned; that affiant has read the bill of complaint in the above styled cause and that the facts therein stated are, to his personal knowledge, true, except in so far as facts therein stated are alleged therein to be upon information and belief and that insofar as they are therein so stated he believes them to be true, except the facts alleged in the said bill pertaining to the actual experience and business of the plaintiff herein, at its own mine mentioned in the bill and as to those allegations affiant believes them to be true.

(49) Affiant further alleges and states that to his own knowledge the unlawful acts and practices alleged by the said plaintiff to have been done and performed by the said defendant in dealing with the said plaintiff are done and performed habitually and as a matter of practice by the said defendant in its dealings with a large number of other coal mining companies whose operations are located upon said defendant's lines, both within and without the State of West Virginia, and which coal mining companies are dependent upon said defendant for their car supply and with like effects and results.

And further affiant sayeth not.

CLETUS H. JENKINS.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 15th day of June, 1920.

J. BLAINE MOORE,
Notary Public.

My Commission expires Aug. 15, 1927.

AFFIDAVIT OF JAMES M. ORR.

IN THE CIRCUIT COURT OF MARION COUNTY,
(50) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore & Ohio Railroad Company, Defendant.
In Equity No. ———

STATE OF WEST VIRGINIA,
Marion County, ss:

On this 15th day of June, 1920, personally appeared before the undersigned Notary Public, James M. Orr, who being first duly sworn, says upon his oath:

That he is a resident of the City of Clarksburg, County of Harrison, State of West Virginia, and is Vice-President and General Manager of the Hudson Coal Company, a West Virginia corporation engaged in the mining of bituminous coal; that affiant has been engaged in the mining of coal in the State of West Virginia continuously for the past twenty-three (23) years; that affiant is a graduate of the School of Mines and Mining of the University of the State of West Virginia and is a mining engineer by profession and has personally engaged in practically all the various kinds of work necessary to the production of coal; that affiant has been a mine superintendent, mine engineer and mine manager and has engaged in no other lines of endeavor than that of bituminous coal mining within the State of West Virginia for the past twenty-three (23) years; that affiant has read the bill of complaint in the above entitled cause and knows the contents thereof and states that the facts set forth in said bill of complaint with reference to car shortage, the assignment of cars at coal mines and the results thereof are true, except as to the facts therein alleged upon information and belief and as to the facts therein alleged with reference to plaintiff's said mine, and as to all such facts affiant believes them to be true.

Affiant further says that the said Hudson Coal Company owns and operates four mines, all of which are located on the lines of the defendant, the Baltimore & Ohio Railroad Company, and are served by it exclusively; that two of the said mines are located in said Marion County, viz., Tucker mine and Betty mine, and that two of said mines are located in the County of Harrison, State of
(51) West Virginia, viz., Miller Mine and Lewis mine;

that said Tucker, Betty and Lewis mines are comparatively new, having been opened up in the past two years and are still in a state of development; that affiant is thoroughly familiar with all the conditions surrounding the operation of the aforesaid mines and with bituminous coal mine operating conditions in general and with the relationship between coal mines and the line of railroad serving them; that the said Hudson Coal Company at no time during the year 1920 has received or loaded any assigned cars at either the said Miller Mine or the said Lewis mine; that "Bulletin No. 4" issued by the defendant, entitled "Distribution of Cars for Coal Loading, April, 1920, and the Mine Ratings Effective May 10, 1920", gives a rating of 5.9 cars per day to said Miller mine, 7 cars per day to said Lewis mine, 6.6 cars per day to said Tucker Mine and 2.3 cars per day to said Betty mine; that during the Month of March, 1920, and prior to the date that the defendant began generally to assign cars in this territory, the said Hudson Coal Company entered into contracts with carriers other than the defendant for railway fuel supply which contracts call for the delivery of an aggregate of about seven (7) cars of coal per day from said Tucker and Betty mines; that thereafter and on or about the 7th day of May, 1920, the defendant began to assign cars to the said Tucker and Betty mines, for the transportation of coal sold under said contracts and that assigned cars have been set into said mines practically on each and every working day since said date; that neither of said contracts contins any provision whatsoever concerning assigned cars and that said cars assigned to said mines by the defendant have been assigned by it without any arrangement, agreement or understanding therefor between the defendant and the said Hudson Coal Company; that affiant and the said Hudson Coal Company are opposed to assigned cars.

Affiant further says that said Miller and Lewis mines are approximately three miles apart and that lying between said Miller and Lewis mines are six other mines operating the same vein of coal and under substantially similar circumstances and conditions; that the mines of the said Hudson Coal Company are at all times in active competition with the said other six mines and with all other mines located in Northern West Virginia and to a

very large extent with all other bituminous coal mines in the State of West Virginia and continguous States producing coal; that the said eight mines being so near to-
(52) gether depend to a very large extent upon the same source of labor supply; that the laborers working in the said eight mines live along the line of the one electric railway line serving that general territory; that three of the said six other mines are operated by the Long Coal Mining Company which Company ever since the method of assigning cars was generally re-established in this territory has sold and now sells its entire output to different railway companies, including, during the early part of said period, the defendant and has enjoyed and now enjoys at said mines the use of assigned cars and that during said period said three mines have run practicallly full time each and every working day; that affiant rides by the said three mines daily going to and from his place of business and has seen on practically every day for more than thirty (30) days last past at each of the said three mines operated by said Long Coal Mining Company empty coal cars standing behind the tipples after the day's work was completed; that affiant has seen on numerous occasions at different of said mines as many as five or six cars standing over empty at the end of the day's work; that since the first day of May, 1920, the said Miller mine of the said Hudson Coal Company has not had a full day's run except on May 10th and May 17th and that since said first day of May said Lewis mine has had but one full day's run, viz., on May 18th; that the percentage of cars supplied to said Miller mine by the defendant from April 16th to June 15th, inclusive, was 38 per cent and to said Lewis mine 36 per cent and that on no day during said period has any car been left over empty at either of said mines1 that because of the assignment of cars to said mines operated by said Long Coal Mining Company which assignment of cars enables said mines to operate practically full time, the best miners living in this district available to the eight mines aforesaid, the miners who are most anxious and able to work full time, have left the employ of the said Hudson Coal Company and have gone into the employ of the said Long Coal Mining Company and that with very few exceptions the miners remaining in the employ of the said Hudson Coal

Company, because of the irregularity of the employment afforded by that company and because of broken running time and the fact that the said Miller and Lewis mines are closed down for a whole day or more at a time, are the less efficient and less desirable miners; that the said Hudson Coal Company owns a large number of miners houses intended for the use and occupancy of its miners and that (53) because of the conditions hereinabove recited miners formerly in the employ of the said Hudson Coal Company and living in the said Company's houses have left the employ of the said Hudson Coal Company and gone into the employ of the said Long Coal Mining Company but refuse to vacate the houses belonging to the said Hudson Coal Company.

Affiant further says that in his experience as a coal mining engineer and in his study of problems connected with the operation of coal mines, he has come to the belief and states the fact to be that the assignment of cars to coal mines results in great economic abuses such as waste of transportation facilities, disturbance of labor conditions, broken running time of the mines, and all the other effects and evils set forth in said bill of complaint; that under ordinary operating conditions, when there is an abundant supply of bituminous coal, it is unprofitable and uneconomic to attempt to operate a bituminous coal mine for any number of hours substantially less than a full days working time, and mines, are not so operated, but that because of the shortage of coal throughout the United States the said Hudson Coal Company and affiant, as its General Manager, have deemed it necessary to operate the mines of said company for whatever period of time each day it was possible to operate the mines even though the operation was for only one or two hours; that the result of operating said mines on broken time is greatly to decrease the efficiency of the operating company's organization and increase its cost per ton of production, and that the operation of the mines of said Hudson Coal Company and of all other coal companies on broken time would not be justified, economically, commercially or otherwise were it not for the fact that coal operators feel in duty bound to exert themselves to the utmost in order to supply the great demand for coal now existing because of the acute shortage thereof.

Affiant further states that said Miller and Lewis mines are approximately thirty (30) miles from the said Tucker and Betty Mines and all four of said mines are located on the Mononagh Division of the defendant, and that though said four mines are entitled to the same percentage of cars for the transportation of coal, the defendant since the date on or about which it began to assign (54) cars to said Tucker and Betty mines, viz., May 7, 1920, has given said Tucker mine a 60 percentage car supply and said Betty mine a 56 per cent car supply, based on the said ratings for May, 1920, whereas during the same period and on the same basis said Miller mine has received a car supply of only 40 per cent and said Lewis mine only 38 per cent; that only two cars have been loaded at said Tucker mine with commercial coal during said period and none at said Betty mine; that during said period the said Tucker and Betty mines have been idle only one full day each while said Miller mine has been idle thirteen full days and said Lewis mine eleven full days.

And further affiant sayeth not.

JAMES M. ORR.

Taken, subscribed and sworn to before me in Marion County, West Virginia, this 15th day of June, 1920.

J. BLAINE MOORE.

My Commission expires Aug. 15, 1927.

AFFIDAVIT OF JAMES H. ALLPORT.

IN THE CIRCUIT COURT OF MARION COUNTY,
(55) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. Beltimore & Ohio Railroad Co., Defendant.	In Equity No. ———

STATE OF PENNSYLVANIA,
Cambria County, ss:

James H. Allport, being first duly sworn, deposes and says that he resides at Barnesboro, Cambria County, Pennsylvania, has been actively connected with the management and operation of bituminous coal mines since the year 1896. Affiant further states that since the year 1893 he has also been in active practice as a civil and mining engineer, and during that period he has acted as consulting engineer for the Huntington & Clearfield Telephone Company, Northern Cambria Street Railway Company, New York Mining & Manufacturing Company, Clinchfield Coal Corporation, Colonial Coal & Coke Company, Wise Coal & Coke Company, Old Dominion Power Co., Bickford Fire Brick Company, Kemmerer Coal Company, Oak Hill Coal Co., Superior Fuel Company, Crescent Refractories Company and other mining, manufacturing and public utility companies.

Affiant further states that as a consulting engineer he has established systems of cost, accounting for mining and manufacturing and public utility companies, and has been employed to report and appraise on bituminous coal properties both developed and undeveloped and to make recommendations for the development of such (56) properties, all of which work necessarily includes and involves the estimating of the cost of producing coal at such properties, and that he has made many such reports, recommendations and appraisals.

Affiant further states that on January 15th, 1918, he became a member of the Engineers' Committee of the United States Fuel Administration, the other members of said Committee being R. V. Norris and Cyrus Garnsey, Jr., and that he held this position until December 13th, 1919. The duties of said Engineers Committee included a study of the costs of all coal mining operations in the United States with the exception of those which were too small to be required to report their costs, and said Committee did in fact make such study for all coal mining districts in the United States.

Affiant further states that he was a co-author with the said R. V. Norris and the said Cyrus Garnsey, Jr., of a paper entitled "Method of Fixing Prices adopted by

the United States Fuel Administration" and the Report of the Engineers Committee, United States Fuel Administration, both of which have been published by the Government Printing Office, Washington, D. C.

Affiant has given special attention to the effect of the rate of production on costs in bituminous coal mining and has found that the interruption of working time always involves an increase of the unit costs, and that the rate of increase in unit cost tends to become materially greater than the rate of decrease in working time.

Affiant further says that by direction of the United States Fuel Administration, the Engineers' Committee of the United States Fuel Administration made a specific study of the effect of decrease in working time on cost of production, and that affiant took part in this investigation; that the material for such investigation consisted of (57) monthly reports of the cost of production and working time for the year 1917, made by 73 bituminous coal operators in the New River District in West Virginia to the Federal Trade Commission.

Affiant further states that the effect of decreased working time on per ton cost of production as shown by this investigation was plotted by said Engineers' Committee, and the chart thus plotted is Chart No. 61, appearing on page 92 of the Report of the Engineers' Committee, above referred to; that said Engineers' Committee also had access to a record of the production costs and working time of a bituminous coal operation at Barnesboro, Pennsylvania known as the Rich Hill Colliery, for the years 1913 to 1917, inclusive, and that said Committee also plotted the effect of decreased working time on production costs as shown by such record, and that the result so arrived at substantially agreed with the result arrived at in the case of the New River operations. The chart showing the result of the said investigation of the Rich Hill Colliery appears in said report of the Engineers Committee at page 95, as Chart No. 64.

Affiant further states that in making said charts the unit production cost for each operator was ascertained for months in which his operation worked full time, and the percentages of increase in cost in months in which such operation did not work full time were also ascertained, and the percentages of increase and average thereof

were plotted on said charts, and that the percentages and averages so ascertained were correctly calculated from data on which they were based.

Affiant further says that the percentage upon which Chart No. 61 is based reduced to tabular form as follows:

When Output is Below Normal by the Percentage.	Cost is above Normal By this Percentage.
(58)	Bituminous
5%	3.1%
10%	6.2%
15%	9.4%
20%	12.5%
25%	15.7%
30%	19.8%
35%	24.5%
40%	29.2%
45%	34.7%
50%	41.0%
55%	44.7%
60%	55.0%
65%	64.5%
70%	75.0%
75%	86.5%
80%	99.0%
85%	114.0%
90%	136.0%

Affiant further states as a result of the investigations hereinabove set forth and in view of his experience both as a bituminous coal operator and a mining engineer and cost accountant, that he is of the opinion that the percentages above set forth indicate the effect of decreased working time on cost of production for the bituminous coal industry in general.

JAMES H. ALLPORT.

Subscribed and sworn to before me this 18th day of June, A. D., 1920.

JOHN R. ULUSSER,

Notary Public in and for Cambria County, Pennsylvania.

My commission expires March 25th, 1921.

STATE OF PENNSYLVANIA,
(59) County of Cambria, ss:

I, Chas. A. MacIntyre, Clerk of the Orphans' Court, the same being a Court of Record in and for the County and State aforesaid, do hereby certify that John R. Musser is a Notary Public, in and for said County and State, duly Commissioned and qualified to act as such; that under the laws of this Commonwealth he is authorized to administer oaths and take acknowledgments of Deeds and other writing; that his term of office commenced on the 25th day of March, A. D., 1917, and will expire on the 25th day of March, A. D., 1991, and that his signature above written is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Ebensburg, Pa., this 18th day of June, A. D., 1920.

CHAS. A. MACINTYRE,
(Seal) Clerk of the Orphans' Court.

AFFIDAVIT OF R. V. NORRIS.

IN THE CIRCUIT COURT OF MARION COUNTY,
(60) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. The Baltimore & Ohio Railroad Company, Defendant.	In Equity No.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

R. V. Norris personally appeared before me, a Notary Public in and for the County of Luzerne, State of Pennsylvania, and being duly sworn, deposed as follows:

First: That he is a Mining Engineer residing and doing business in Wilkes-Barre, Pennsylvanna, that he is a graduate of the School of Mines, Columbia College with the degree of Engineer of Mines, 1885, honorary degree

Master of Science from Columbia University, New York, 1914, and that he has held the following positions:

Assistant Engineer Susquehanna Coal Co., Mineral Railroad & Mining Company, Lykens Valley Coal Co., Summit Branch R. R. Co., Nanticoke Water Company, Lykens Water Company, etc., being the coal and water companies controlled by the Pennsylvania Railroad 1886 to 1900.

Chief Engineer same, 1900 to 1904.

Consulting Engineer same 1904 to 1914.

Consulting Engineer Delaware, Lackawanna & Western Railroad Company, Coal Mining Department, 1907 to 1918.

Consulting Engineer Wilkes-Barre & Hazelton Railroad, 1905, to date.

Consulting Engineer Sterling Salt Company, 1906 to date.

Consulting Engineer Coxe Bros. & Co., 1904 to 1905.

Consulting Engineer and General Manager Stone Canon Consolidated Coal Company, 1907 to 1909.

Engineer to the United States Fuel Administration, January 15th, 1918, to April 15th, 1919.

(61) Affiant further says that his experience has comprised the examination, appraisal, opening and direction of operation of mines, for the last thirty-four years, and as consulting engineer for the last sixteen years. In this is included the examination and appraisal of the anthracite properties of the Pennsylvania Railroad and of the Temple Iron Company, and of bituminous properties in Pennsylvania, West Virginia and California.

Affiant's experience in the Fuel Administration was as a member of the Engineers' Committee, which was in charge of all cost data, and the work of which included the study of the costs of production of all coal operations in the United States, except such as were so small as not to be required to report, said committee being composed of Cyrus Garnsey, Jr., J. H. Allport, and affiant.

Affiant further states that he has been a member of the American Institute of Mining and Metallurgical Engineers since 1885, and was a member of the Council thereof from 1908 to 1910, Vice-President from 1911 to 1912, and is now one of the Directors; that he is a member of the Institution of Mining Engineers of Great Brit-

ian, and was the delegate of that society to the International Engineering Congress at San Francisco in 1915, and Editor of the Coal Section of said Congress. Affiant is also a member of the American Society of Civil Engineers, and the American Society of Mechanical Engineers.

Affiant further states that in 1919, he was employed with Col. R. H. Montgomery, to devise a standard accounting system for the anthracite industry, and that the system so devised is now in general use.

Affiant is also the author of "Anthracite Mining Costs", a paper read before the American Institute of Mining Engineers, and published by that society in 1919, and is one of the co-authors of a paper entitled "Method of Fixing Prices of Bituminous Coal Adopted by the United States Fuel Administration", by Cyrus Garnsey, Jr., R. V. Norris, and J. H. Allport, and the Report of the Engineers' Committee, United States Fuel Administration, both of which have been published by the Government Printing Office, Washington, D. C.

Second: Affiant has made special studies of the effect of rate of production on costs, both in anthracite and bituminous mining, and has found invariably that the reduction of working time from any cause involves material increased unit costs, that the rate of cost increase is progressively greater than the rate of decrease in working time, that is, it is invariably found that as the working time decreases the cost increases in a rapidly increasing ratio.

(62) Affiant further says that by direction of the United States Fuel Administrator, the Engineer's Committee of the United States Fuel Administration made a specific study of the effect of decrease in working time on cost of production, and that affiant took part in this investigation; that the material for this investigation consisted of monthly reports of the cost of production and working time for the year 1917, made by 73 bituminous coal operators in the New River District in West Virginia to the Federal Trade Commission.

Affiant further states that the effect of decreased working time on per ton cost of production as shown by this investigation was plotted by said Engineers' Com-

mittee, and the chart thus plotted is Chart No. 61, appearing on page 92 of the Report of the Engineers' Committee, above referred to; that said Engineers Committee also had access to a record of the production costs and working time of a bituminous coal operation at Barnesboro, Pennsylvania, known as the Rich Hill Colliery, for the years 1913 to 1917, inclusive, and that said Committee also plotted the effect of decreased working time on production costs as shown by such record, and that the result so arrived at substantially agreed with the result arrived at in the case of the New River operations, the chart showing the result of the said investigation of the Rich Hill Colliery appears in said report of the Engineers Committee on page 95, as Chart No. 64.

Affiant further states that in making said charts the unit production cost for each operator was ascertained for months in which his operation worked full time, and the percentage of increase in cost in months in which such operation did not work full time were also ascertained, and the percentages of increase and averages thereof were plotted on said charts, and that the percentages and averages so ascertained were correctly calculated from the data on which they were based.

(63) Affiant further says that a similar analysis were made by him in the case of about nineteen anthracite collieries controlled by the Pennsylvania Railroad Company, in connection with a report and appraisal of the properties of the Susquehanna Coal Company made in 1915, which analysis showed results similar to those in the cases of the bituminous operations above referred to.

Affiant further says that the percentages upon which Chart No. 61 is based reduced to tabular form are as follows:

When Output is Below Normal by the Percentage.	Cost is above Normal By this Percentage.
	Bituminous.
5%	3.1%
10%	6.2%
15%	9.4%
20%	12.5%

25%	15.7%
30%	19.8%
35%	24.5%
40%	29.2%
45%	34.7%
50%	41.0%
55%	44.7%
60%	55.0%
65%	64.5%
70%	75.0%
75%	86.5%
80%	99.0%
85%	114.0%
90%	136.0%

And affiant states as a result of the investigations heretofore set forth that it is his professional opinion that the percentage above set forth are typical for the bituminous coal industry and fairly indicate the character and extent of additional costs resulting from decreases in operating time as compared with full time operation.

R. V. NORRIS.

Subscribed and sworn to before me this 17th day of June, A. D., 1920. My Commission expires March 25, 1921.

EDMUND E. JONES,
Notary Public in and for Luzerne County, Pennsylvania.

STATE OF PENNSYLVANIA,
(64) County of Luzerne, ss:

I, George Wagner, Clerk of the Court of Quarter Sessions of Luzerne County, in the State of Pennsylvania, the same being a Court of Record, having a Seal, do hereby certify that Edmund E. Jones, by whom the foregoing affidavit was taken and whose name is subscribed thereto, was at the time of taking the same, a Notary Public, residing in said County, duly commissioned and sworn, and authorized by the laws of said State to take the proof or acknowledgment of deeds or conveyance for lands, tenements or hereditament in such State, and

other instruments in writing and to administer oaths or affirmations in said County, and that I am well acquainted with his handwriting, and verily believe that the signature to the foregoing certificate is his genuine signature.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, which is the seal of the said Court this 18th day of June, 1920.

GEORGE WAGNER,
(Seal) Clerk of Courts.

AFFIDAVIT OF H. A. GARFIELD.

IN THE CIRCUIT COURT OF MARION COUNTY,
(65) STATE OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore & Ohio Railroad Co., Defendant.
} In Equity No.

COMMONWEALTH OF MASSSUCHETTS,
Berkshire County, ss:

H. A. Garfield, being first duly sworn, deposes and says that he was appointed United States Fuel Administrator by the President of the United States on the 23d day of August, 1917; that said appointment was made pursuant to an act of Congress commonly known as the Food and Fuel Control Act, approved August 10, 1917, and by its terms affiant was authorized and directed to execute the provisions of said Act relating to fuel, including the provisions of Section 25 thereof for the control and regulation of the production, distribution and price of coal and coke, and that affiant entered upon the duties of his office on or about the first of September, 1917.

Affiant further states that in the course of his investigation of the cause limiting the production and distribution of coal and the needs of the consuming public, especially of domestic consumers and those engaged in the manufacture of munitions of war, it became neces-

sary to inquire into the costs of production and the scope and effect of contracts theretofore entered into between producers and consumers of coal. Affiant found that about one-third of the bituminous coal produced in the United States was consumed by the railroads for locomotive fuel and that the conditions surrounding the supply of railroad fuel constituted the largest single factor entering into the question of labor supply in the production of coal and the price of coal to the public. Affiant having caused a special investigation to be made of conditions surrounding the supply of railroad fuel, it appeared that in certain districts of the country producing bituminous coal it had for a long time been the custom of (66) the railroads to enter into contracts with operators for railroad fuel based upon the supply to the operators making such contract of cars for the shipment of coal in excess of the number or proportion of cars which such operators would be entitled to receive upon the basis of the ratings of their mines. Affiant learned that operators, while realizing that the prices names by the railroads were excessively low, were nevertheless influenced to enter into these contracts in order to secure for themselves an ample car supply; that this question of car supply became in the eyes of operators of first importance whenever the demand for coal exceeded the available car supply.

Affiant further found that when, as in the spring of 1918, this condition of shortage in car supply prevailed, two conditions were present seriously harmful to the public.

First, operators having contracts for railroad fuel were able to ship coal substantially every day in the week; while other operators in the same field having no contracts for railroad fuel were compelled to close down their mines for lack of cars. This unbalanced condition threw large numbers of mine workers out of employment in the mines that were not furnishing railroad fuel, while in neighboring operations the labor found satisfactory employment. Affiant found this condition a subject of great and serious complaint among the mine workers, and that, at that particular time, namely, the spring and summer of 1918, it was of first importance to continue operations without suspensions and further that

conditions in the mining fields should be made so satisfactory to labor that the maximum of production could be secured.

Affiant found in the second place that the unbalanced situation produced by contracts involving a full assignment of cars inevitably resulted in imposing upon the public a burden, which it would not have otherwise had to bear and which was of considerable magnitude. This was in part due to the fact that as soon as a given mine was compelled by car shortage to fall below a certain production, the per ton cost of operation mounted rapidly, thereby throwing an unwarrantably large burden upon the purchasers of coal, assuming a constant amount representing profit; and partly because of the fact that the prices forced upon the operators by the railroads for railroad fuel were at figures so near to cost that what-
(67) ever profits were made by the operators were of necessity made from the purchasers of coal other than the railroads.

As a result of this investigation affiant became convinced that the public interest required the abandonment of the practice of preferential car supply to operators supplying railroad fuel, and on or about March 27, 1918, took steps to secure the adoption by the Director General of Railroads of the principle of an equal distribution of cars.

The position thus taken by affiant led to an issue with the Railroad Administration beginning about the 27th of March, 1918, and lasting until the latter part of May of that year. During this period there were frequent conferences between the Fuel Administration and the Railroad Administration, at which representatives of the Interstate Commerce Commission were occasionally present. Affiant's arguments in favor of a substantially equal car supply were met by the claim that the practice of preferential assignment of cars was of long standing and well recognized in the railroad world, that it was based on the necessity of maintaining the supply of railroad fuel so that the railroads might continue to perform their functions as common carriers, and that even if the Fuel Administration would undertake to insure a sufficient supply of locomotive fuel, the principle of equal car distribution would throw upon the railroads an

additional expense for the purchase of fuel amounting in the aggregate to from $40,000,000 to $60,000,000.

Affiant further states that ultimately a settlement was reached and approved by the Director General of Railroads, by the terms of which the preferential assignment of cars to operators supplying railroad fuel was to be discontinued and the government maximum prices of bituminous coal were to be reduced 10 cents per ton. This reduction was made by affiant in view of the reduction in the cost of producing coal which would be effected by the application of the principle of equal car supply.

Affiant further says that the settlement so reached was carried into effect and that affiant, as United States Fuel Administrator, signed an order on or about May 24, 1918, reducing all maximum prices of bituminous coal ten cents per ton, and that from the date of said order (68) and until the resignation of affiant as United States Fuel Administrator on December 13, 1919, the principle of equal car distribution was maintained and applied by the Railorad Administration, and the said reduction in price was maintained by the United States Fuel Administration.

H. A. GARFIELD.

Subscribed and sworn to before me this 16th day of June, A. D., 1920.

WM. J. CARTWRIGHT,
Notary Public, Berkshire County, Massachusetts.

COMMONWEALTH OF MASSACHUSETTS,
(69) County of Berkshire, ss:

I, Irving H. Gamwell, Clerk of the Supreme Judicial Court, which is a Court of Record for the County and Commonwealth aforesaid, and has by law a seal, do hereby certify that Wm. J. Cartwright, whose signature is subscribed to the certificate on the annexed instrument and thereon written, was, at the date thereof a Notary Public, within and for said Commonwealth of Massachusetts, duly commissioned and sworn and residing in said County of Berkshire, and duly authorized to take the same, and an officer duly authorized by the laws of said Commonwealth to administer oaths or affirmations

and to take the acknowledgment or proof of deeds for the conveyance of lands, tenements or hereditaments in said Commonwealth of Massachusetts, or other instruments to be used or recorded therein, and that I am well acquainted with the handwriting of said Wm. J. Cartwright, and verily believe that the signature to the said certificate is genuine.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsfield, this 16th day of June, 1920.

(Seal) IRVING H. GAMWELL, Clerk.

MOTION OF DEFENDANT TO DISMISS WITH ANSWER.

In the District Court of the United States for the
(70) Northern District of West Virginia.
In Equity.

Lambert Run Coal Company, Plaintiff,
vs.
The Baltimore and Ohio Railroad Company, Defendant.

Motion to Dismiss and Answer.

To the Honorable the Judge of the District Court of the United States for the Northern District of West Virginia:

The defendant respectfully moves the Court to dismiss said bill of complaint and for cause of motion shows:

1. That the bill does not state a case within the jurisdiction of the Circuit Court of Marion County or of this Court.

2. That it does not appear in said bill that the matters complained of have been complained of to the Interstate Commerce Commission or that said Commission has taken any action in respect thereof, and that the Circuit Court of Marion County has no jurisdiction in respect of the matters complained of in the bill and this

Court has no jurisdiction until the matters have been complained of to the Interstate Commerce Commission.

3. That the plaintiff has concealed the fact that the rules complained of are rules of the Interstate Commerce Commission, which fact was within the plaintiff's knowledge, and which fact is a most material and necessary fact for the proper determination of this case.

4. That this Bill is a bill to restrain the enforcement, operation and execution of an order of the Interstate Commerce Commission, and United States of America and the Interstate Commerce Commission are necessary parties to this case.

5. That said bill is without equity.

Wherefore, the defendant prays that said bill may be dismissed.

(71) The defendant not waiving its said motion to dismiss, but expersly relying on the same, answering, says:

1. It admits that the plaintiff is a corporation organozed and existing under the laws of the State of West Virginia, with its principal office in the city of Fairmont, Marion County, in said State.

2. It admits that the defendant is a corporation organized and existing under the laws of the State of Maryland and is a common carrier by railroad engaged in interstate transportation and, as such, subject to the Interstate Commerce Act, and further shows that the plaintiff was at the time of the commencement of this suit and, at all times since, has been and still is a resident and citizen of the State of West Virginia, and that the defendant was at the time of the commencement of this suit, and, at all times since, has been and still is a resident and citizen of the State of Maryland, having its principal office in Baltimore City, in said State, and that the plaintiff was not at the time of the commencement of this suit, nor at any time thereafter, nor is it a resident or citizen of any other State than said State of West Virginia, and

that the defendant was not at the time of the commencement of this suit, nor at at any time theerafter, nor is it a resident or citizen of any other State than said State of Maryland.

3. The defendant admits that this is a suit of a civil nature in equity, and shows that the matter in controversy in this cause exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00). It admits that this suit necessarily involves and presents for decision the construction of the Interstate Commerce Act as amended, and involves and presents for decision paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 thereof, which paragraphs were added to said Section 1 by Section 402 of the Transportation Act, 1920.

The defendant denies that the plaintiff has been or is deprived of the proper distributive share of cars available for the transportation of coal to which it is entitled under said act.

(72) 4. The defendant is not advised as to the business of the plaintiff in the operation of its mines, as alleged in paragraph 4 of the bill.

5. The defendant admits that it has maintained ratings of the capacity of the mines served by it, including the mines of the plaintiff, and now maintains such mine ratings in accordance with said act, as amended, and the rules of the Interstate Commerce Commission governing such rating.

The defendant admits that Exhibit A is a correct copy of the rules issued by its Transportation Department, April 16th, 1920, under the authority of said Commission as hereinafter stated.

The defendant further admits that the rating of the plaintiff's mine for the period from May 10th to June 9th, inclusive, 1920, was 11.5 fifty ton cars per day.

6. The defendant admits that, for some time past, the supply of cars available for transportation of coal has not been sufficient to afford to all mines upon its railroads sufficient cars to transport all of the coal which might be produced at said mines, but the defendant de-

nies that it has furnished and now furnishes cars for transportation of coal to certain mines served by it in excess of the share to which said mines are entitled, or that it has failed to furnish said mine of the plaintiff the share of cars to which said mine is entitled, or has made any unlawful distribution of the cars available for this service. On the contrary, the defendant avers that it has in all respects observed and complied with the law and the rules established by the Commission in respect to the distribution of cars.

7. The defendant avers that, prior to Federal control, it was its practice to assign cars for loading for fuel; that such practice had been the subject of numerous cases before the Commission and before the Federal courts; the history of these proceedings being fully set out in a report of the Commission responsive to Senate (73) Resolution No. 376, which report and a copy of the Senate Resolution, in response to which it was made, are herewith filed marked "Defendant's Exhibit A" and are prayed to be taken and read as a part of this answer. Said report also contains the reasons given by the Commission for the issuance of its order of April 15th, 1920, hereinafter referred to. That on or about June 24th, 1918, the United States Railroad Administration discontinued the practice of assigning cars for railroad fuel on the lines of the defendant's railroad, and the discontinuance of his practice continued until the order of the Commission of April 15th, 1920, became effective, April 16th, 1920. That upon the issuance of said order of April 15th, 1920, which directed the observance by all carriers subject to the act of Rule 8 as thereby modified until further direction of the Commission, the defendant in compliance with said direction of the Commission restored the practice of assigning cars for its railroad fuel and observed Rules 8, 9 and 10 in the distribution of such assigned cars, as it was required to do, and is now assigning cars for its railroad fuel and obeying the order of the Commission in counting cars assigned for its railroad fuel, as well as private and cars of other carriers assigned and delivered to it by such carriers for railroad fuel in accordance with the requirements of the Commission.

That the United States Railroad Administration had in effect at the termination of Federal control certain rules for the distribution of cars contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised). On March 2nd, 1920, the Commission issued a notice to carriers recommending that, until experience and study demonstrated that other rules would be more effective and beneficial, these rules be continued in force, which recommendation the defendant complied with and continued these rules in force. On April (74) 15th, 1920, the Commission issued its notice to Carriers and Shippers of that date stating that in view of the cessation of Government control of coal production and distribution, and in order that railroad fuel requirements might be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it had become necessary to amend said notice of March 2nd, 1920, and its recommendation therein, and, thereupon, the Commission recommended the revision of Rule 8 to read as quoted in the bill, and stated that, in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act, 1920, it suspended the operation of the existing Rule 8 and directed the observance by all carriers by railroad subject to the Interstate Commerce Act of Rule 8 modified as above, effective April 16th, 1920, and until the further direction or order of the Commission. Copies of said notice of March 2nd, 1920, and said notice of April 15th, 1920, are herewith filed marked "Defendant's Exhibit "B" and are prayed to be taken and read as a part hereof.

That the reasons stated by the Commission for its action in directing the restoration of the practice of assigning cars for railroad fuel are fully stated in its report to the Senate.

That in compliance with the order of the Commission of April 15th, 1920, the defendant caused to be issued by its General Superintendent of Transportation its rules governing the rating of coal mines and car distribution to such mines effective April 16th, 1920, a copy of which is filed as Plaintiff's Exhibit A.

8. That the defendant is informed and believes that

the plaintiff was fully advised of the issuance by the Commission of its notice of April 15th, 1920, which was sent to Carriers and Shippers and widely distributed and of which the Coal Trade was fully advised. That the plaintiff has not stated in its bill that such order was issued and that the rules issued by the defendant and filed (75) as Exhibit A with the bill were rules in strict conformity with the recommendation of the Commission of March 2nd, 1920, as directed to be amended by its notice of April 15th, 1920, which notice was an emergency order idduced by the Commission suspending the operation of existing Rule 8 and directing the observance by all carriers of Rule 8 as modified, which order is still binding upon the defendant and must be observed by it until revoked by the Commission or set aside by order of a court of competent jurisdiction in a proceeding filed for the purpose of setting aside such order. That the plaintiff has asked an injunction restraining the defendant from observing and enforcing Rules Nos. 8, 9 and 10, which it avers are the rules of the defendant, without advising the Court that said rules are rules first established by the United States Railroad Administration and recommended to be adopted by all carriers by said notice of the Commission of March 2, 1920, and as to Rule 8, which is the rule principally complained of, established by the orer of the Commission of April 15, 1920.

9. That said order of April 15, 1920, was not passed in a proceeding before the Commission in which either the plaintiff or the defendant were parties and does not relate to a matter complained of before the Commission. That the Commission's report to the Senate shows that said order was made by the Commission not in pursuance of any formal complaint made before the Commission, but as an administrative order of the Commission in the exercise of the power conferred upon it upon its own initiative without complaint by carriers or others.

10. The defendant admits that the supply of coal cars available for that service does not at the present time equal the requirements of the mines, and that such condition prevails on all of the roads largely engaged in carrying bituminous coal. That, prior to Federal control,

the defendant and other railroads observed the practice of assigning cars for railroad fuel as required by the (76) Commission under the orders issued in the cases referred to in its report to the Senate, and approved in the several cases therein referred to decided by the Supreme Court of the United States and the Circuit and District Courts. That in June, 1918, United States Fuel Administration had charge of the distribution of coal and had fixed a maximum price at which coal could be sold in the various district. The defendant, upon information and belief, denies that the practice of assigning cars for railroad fuel was discontinued because of representations made to the Director General of Railroads with respect to its disastrous effect upon the coal mining industry, as alleged in the bill, but, on the contrary, avers that it is informed and believes that the reason for the discontinuance of the practice of assigning cars for railroad fuel at that time was because the Fuel Administration believed that it could better perform the duties entrusted to it if it had entire control over the distribution of coal, and advised the railroads as appears from the letter of July 6, 1918, quoted in the bill, that the Fuel Administration would see that the carriers obtained an adequate current supply of fuel. That the discontinuance of the practice of assigning cars was brought about not on account of a finding that the practice under ordinary conditions was injurious to the coal mining industry, but because of the conditions then obtaining.

The defendant refers to the report of the Commission to the Senate, filed herewith, giving the opinion of the Commission as to the desirability of returning to the use of assigned cars at this time. As appears from this report, the Commission, since 1907, has had this question constantly before it in a number of cases which it cites, and it has reached the conclusion that the rules which it has put in force are the best rules after fully considering the question in all its aspects. It states "both before and since that action was taken, parties in- (77) terested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adopted to their uses which can fairly be substi-

tuted for the rule to which some objections have been made. No one has suggested such a substitute rule".

The defendant shows that the assignment of cars does not diminish the car supply available to the plaintiff for commercial purposes. The plaintiff requires for its fuel coal supply about 150 carloads of coal a day from the Fairmont district. Under the present rules these assigned cars are not deducted from the cars available for commercial distribution in this district, but are taken from the systems' supply of cars.

Other railroad companies are at this time sending into this district about 140 cars per day for railroad fuel commonly known as "foreign fuel cars". These cars are not taken from the cars of such railroads on the defendant's line in the usual course of interchange business, but are specially assembled and sent into the district for fuel, and constitute an addition to the cars coming into the district for coal.

The defendant further shows that the enjoining of it from observing Rules Nos. 8, 9 and 10 would not only affect the business of the plaintiff in this district and within the jurisdiction of this Court, but would affect its distribution of cars over its entire system, as the defendant could not adopt one practice in this district and a different practice in other respects without great confusion. That it would also very seriously interfere with the contracts and arrangements for fuel which have been made by other railroads taking their supply in this district and sending in into the district their own cars to transport the same.

(78) 11. The defendant denies that it has failed or refused to maintain and apply proper rating to the mine of the plaintiff or to give to the mine of the plaintiff its proper proportion of the cars available for transportation of coal, and avers that in issuing its rules governing the rating of coal mines and car distribution, filed as Exhibit A with the bill, and in its practice of car distribution and the assigning of cars for its railroad fuel, and in the counting of assigned cars, both private cars and cars placed for its own fuel and cars furnished by other carriers for their fuel, it has in all respects fully complied with the requirements of law and the lawful orders of the Commission made in pursuance thereof.

12. That the plaintiff does not allege in its bill that application has been made to the Interstate Commerce Commission to require the defendant to cease from its practice with respect to car service, or that any proceeding has been taken before the Commission by the plaintiff or others complaining that the rules, regulations and practices with respect to car service now observed by the defendant are not lawful or are unjust, unreasonable and discriminatory, and asking that the Commission order the defendant to put in force reasonable rules, regulations and practices with respect to car service, and in compliance with its legal duty. The defendant avers that no such proceedings before the Commission has been brought.

The defendant avers that the matters complained of are, under the Interstate Commerce Act and particularly under paragraphs (10), (11), (12), (13), (14), (15), (16), and (17) of Section 1 thereof, within the jurisdiction of the Interstate Commerce Commission, and the enforcement of the rights of the plaintiff under said Act is within such jurisdiction, and no action will lie to determine and enforce the rights of the plaintiff in respect of car service until application has been made to the Commission for a determination and enforcement of such rights.

(79) 13. The defendant, therefore, respectfully submits:

FIRST: That the plaintiff has not stated to the Court that the rules which it seeks to have enjoined were rules adopted by and ordered to be observed by the Commission, which fact is most material to a determination of this case and which fact was within the knowledge of the plaintiff, and that the bill should be dismissed because the plaintiff has concealed a most important fact necessary to a determination of the cause.

SECOND: That the matters complained of are within the jurisdiction of the Interstate Commerce Commission, and no action will lie in respect thereof until complaint has been made and the matter passed upon by the Commission.

THIRD: That the Commission, in the exercise of the authority conferred upon it by Section 1, Paragraph (15) of the Act has found that "and emergency exists requiring immediate action", and has directed the observance by all carriers by railroad subject to the Interstate Commerce Act of the method of car distribution sought to be enjoined by the bill, and that such action by the Commission is a lawful exercise of the authority conferred upon it by said Section.

The defendant, therefore prays that said bill may be dismissed with costs to the plaintiff.

And as in duty bound, etc.

THE BALTIMORE & OHIO RAILROAD COMPANY,

By H. R. HUNTER,
A. HUNTER BOYD, Jr.,
HOFHEIMER & TEMPLEMAN, Its Solicitors.

STATE OF MARYLAND,
(80) City of Baltimore, to-wit:

I hereby certify that on this 28th day of June, 1920, before me, the subscriber, a notary public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared C. W. Galloway, who, being duly sworn, deposes and says: That he is Vice-President of the Baltimore and Ohio Railroad Company; that he has read said answer and knows the contents thereof, and that said answer and all the matters, things and allegations therein contained are true except those therein stated to be upon information and belief, and as to such allegations, matters and things he believes them to be true.

C. W. GALLOWAY.

Attest:

C. W. WOOLFORD, Secretary.

Taken, subscribed and sworn to before me this 28th day of June, 1920.

GEO. W. HAULENBERK,
(Seal) Notary Public.

My Commission expires May 21, 1922.

DEFENDANT'S EXHIBIT "A" WITH ANSWER.

66th Congress
(81) 2d Session S. Res. 376.

IN THE SENATE OF THE UNITED STATES

May 24 (Calendar day, May 29), 1920.

Mr. Harding submitted the following resolution; which was considered and agreed to.

RESOLUTION

Whereas the railroad companies are making assignments of freight cars; and

Whereas the said railroad companies, or a part of them, are making such assignment in a manner alleged to be discriminatory and prejudicial to the common public welfare; and

Whereas authority for making assignment of cars by said railroad companies is predicated upon an order of the Interstate Commerce Commission, which order is known as order numbered of the Interstate Commerce Commission, dated April 15, 1920, and entitled "Notice to carriers and shippers," and is in the following words and figures:

"The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Cars Service

Section Circular CS31 (Revised) be continued in effect, except that rule eight as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decision of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al., v. Hocking Valley Railway Co.* (12 I. C. C. 398) and *Traer v. Chicago & Alton Railroad Company, et al.* (13 I. C. C. 451, will be designated as 'Assigned' cars. All other cars will be designated as 'unassigned' cars."

1. Resolved, That the Interstate Commerce Commis-
2 sion be directed to inform the Senate upon what au-
3 thority, if any, said order was issued.

66th Congrss
(82) 2nd Session. S. Res. 376.

RESOLUTION

Directing the Interstate Commerce Commission to inform the Senate upon what authority its order of April 15, 1920, as to assigned and unassigned cars was made.

.....

.....By Mr. Harding.....

May 24 (calendar day, May 29), 1920,—Considered and agreed to.

INTERSTATE COMMERCE COMMISSION
(83) Washington

June 11, 1920.

To the President of the Senate:

I have the honor to transmit herewith report of the Interstate Commerce Commission *In re* Assignment of Freight Cars which is responsive to the direction conveyed by Senate Resolution No. 376 of May 24, 1920.

EDGAR E. CLARK, Chairman.

(84) June 11, 1920.

IN RE ASSIGNMENT OF FREIGHT CARS.

By Senate Resolution No. 376 the Interstate Commerce Commission was directed to inform the Senate upon what authority, if any, its order of April 15, 1920, entitled "Notice to carriers and shippers" was issued.

Prior to 1907 it was a common practice for the railroads to deliver to coal mines cars privately owned or leased, foreign railway fuel cars and cars for the carriers' own fuel loading, accordingly as the cars were consigned or assigned and as the railroad had contracts for purchase of fuel coal, and to refrain from counting or charging such cars against the distributive shares of the mines to which they were given. In other words, all such cars were given to the mines for which they were intended and such mines were given in addition their full share of the other cars available for distribution. This practice was complained of as unreasonable and unduly prejudicial and in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, decided July 11, 1907, the Commission held that privately owned or leased cars, and foreign railway fuel cars sent on to the line by other railway companies for loading with fuel coal for the use of such other railway companies, should be given to the mines to which they were consigned or assigned but must be counted against the distributive shares of the mines, and that if such specially consigned or assigned cars equalled or exceeded the distributive share of a mine receiving them it should have no additional cars, and if the specially consigned or assigned cars did not equal the distributive share of the mine to which given it should be given additional cars only sufficient to make up its distributive share.

In the report in this case it was pointed out that in *U. S. ex rel Pitcairn Coal Co.* v. *B. & O. R. R. Co.*, 165 Fed. 113, a similar decision was made as to private cars and a contrary decision as to foreign railway fuel cars, but that in *Logan Coal Co.* v. *Penn. R. R. Co.*, 154 Fed. 497, it was held that such foreign railway fuel cars should be counted against the mines to which they were consigned.

Among other considerations mentioned in the Commission's report was the fact that a railroad company

would not send its cars on to the lines of another railway company even for its own fuel supply if they were to be diverted from that intended use and distributed among others than those to whom they were consigned for loading to various destinations on the lines of other carriers, thus rendering the fuel supply of the carrier sending the cars uncertain and depriving it of the use of its equipment.

In *Traer* v. *Chicago & Alton R. R. Co., et al.*, 13 I. C. C. 451, decided April 13, 1908, the same questions were presented that had been presented in *R. R. Com. of Ohio, et al., v. H. V. Ry. Co., supra*, and the additional question of the reasonableness of the carrier's failing to count against the mine to which they were delivered cars for loading with its own railroad fuel. The Commission followed the decision in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*, and in addition, held that the cars used by carriers on their own lines for transportation of their own fuel supply may be given to the mine or mines from (85) which such fuel supply is received, but that if such mine or mines also ship commercial coal fuel cars so supplied must be counted against the mine or mines under the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra*.

In this case it was said that if a contract for fuel covers such supply as the carrier reasonably needs for its current operation and a period of car shortage should come it could use its equipment to procure its fuel even though it thereby deprived shippers of desired use thereof; that this right to so use its cars did not rest upon the ground of private contract but upon the public necessity that the railroad must have fuel; but that neither contract nor consideration of public policy which recognized the public necessity for fuel would justify the carrier during a period of car shortage in using its equipment for a superfluous supply of its own fuel when such equipment was demanded and needed by the shippers and the public. Recognizing the right of the carrier to secure its fuel supply either from mines which it owns or those the entire output of which it purchases, it was held that where the carrier purchases a portion of the output

of a mine which is also producing commercial coal it may not discriminate in favor of such mine by failing to count against it in the distribution of cars those cars which it furnishes to that mine for its own fuel.

In *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. 86, decided June 2, 1908, the rule laid down in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra,* was again followed, and it was said that the ownership of a private car gives to the owner no superior right to use the facilities of the carrier in transporting it; that the ownership of a private car or the possession of a foreign railway fuel car gives to a coal operator no preferred right to have it occupy a carrier's sidings or tracks as against a system car loaded by another operator, or to have it handled in trains in preference to a system car, and that when any of these general facilities are insufficient to move all the traffic offered no operator has a superior right over another merely because he enjoys the advantage of owning private cars or has fuel contracts with connecting lines.

In *Interstate Com. Com.* v. *Ill. Cent. R. R. Co.*, 215 U. S. 453, decided January 10, 1910, the Supreme Court of the United States sustained the decision of the Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co., supra,* and in *Traer* v. *Chicago & Alton R. R. Co., supra,* and held that the act to regulate commerce delegated to the Commission authority to determine on complaint the question of distribution of coal cars, including the carrier's own fuel cars, in times of car shortage as a means of prohibiting undue preferences and unjust discriminations.

In *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.*, 19 I. C. C. 356, decided March 7, 1910, the above decision of the Supreme Court was referred to in pointing out that the orders of the Commission with respect to the distribution of coal cars by interstate carriers remained unaffected by attacks that had been made upon them in the courts, and that further consideration of these questions in connection with this group of cases had confirmed the conviction that the general principles underlying the dis-

position made of previous cases were both sound and just. The rule applied by the carrier in the *Hillsdale case* was described, its effect was explained, and it was condemned as giving undue advantage in distribution to certain mines and as contrary to the previous decisions of the (86) Commission. In a supplemental report in this case, 23 I. C. C. 186, reparation was awarded for damages resulting from the discrimination which had been practiced and found.

In *Penna. R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, decided June 21, 1915, the Commission's award of reparation in *Hillsdale Coal & Coke Co.* v. *P. R. R. Co., supra*, was sustained by the Supreme Court notwithstanding the fact that an action had been brought in a State court on the same subject before the Commission had made its award of reparation. The Supreme Court held that where a complaint involves practices of carriers in distributing cars for interstate shipments no action is maintainable in any court for damages alleged to have been inflicted thereby until the Commission has made a finding as to the reasonableness of such practices.

In the Commission's report of June 9, 1914, to the Senate and House of Representatives in *Coal and Oil Investigation*, 31 I. C. C. 193, it said at page 218:

As to actual distribution of cars in accordance with the relative ratings of the mines, the opinion of the Commission is clearly set forth in *Tracy* v. *C. & A. R. R. Co.*, 13 I. C. C. 451, and it was sustained by the Supreme Court of the United States in 215 U. S. 452 and 479. Formerly, few of the roads counted against the mine ratings company fuel cars (i. e., cars to be loaded with the carrier's own fuel); private cars (i. e., cars owned or leased by coal companies); or foreign consigned cars (i. e., cars delivered by foreign roads for loading at particular mines). In the case just cited, the Commission ruled that all three classes of cars should be counted against the ratings as well as those furnished for commercial loading. In cases where the carrier takes the entire output of a mine, however, it has been considered permissible to deduct the number of cars delivered to that mine from

the available supply before prorating among mines shipping commercial coal, or both commercial and railroad coal.

The rule of law on this subject thus established remained the controlling rule for carriers generally, and apparently without friction or controversy, until during the war and under the rules of the Fuel Administration, including its zoning system, and while the roads were under federal control, the rule was changed and the use of assigned cars for loading with railroad fuel was abandoned. This change was followed by the imperative necessity of railroads resorting to confiscation of coal in transit in order to keep their roads in operation. In many instances the coal was confiscated at the mouth of the mine. Those familiar with these subjects are apparently unanimous in saying that the practice of confiscation is attended by more evils than is the practice of assigned cars for railway fuel.

When federal control terminated there was in effect on all roads under federal control a set of rules that had been formulated by the Railroad Administration after consultation with a committee of the National Coal Association, and in order that there might not be confusion because of different lines of action being followed by different individual roads the Commission on March 2, 1920, issued a notice to carriers and shippers recommending that until experience and study demonstrated that (87) other rules would be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

With the suspension of the activities of the Fuel Administrator and regulations which he had prescribed some railroads that did not have more than two or three days' supply of coal and that were and for some time had been securing their necessary fuel supply by confiscation at the mouth of the mines were sued for damages on account of such confiscation, injunctions were sought in State courts against the practice of confiscation, and when it was learned that the carriers were contemplating return to the yse of assigned cars injunctions were sought in State courts against the same carriers restraining them from using assigned cars. Numerous informal

conferences were had between the Commission and representatives of the coal operators and representatives of the railroads in an effort to find some way by which the carrier could be assured of a fuel supply without the use of assigned cars or resort to confiscation. A conference was arranged between a committee representing the railroads and a committee representing the National Coal Association for the purpose of devising, if possible, some plan that would effect that purpose but no concrete or definite suggestion to that end resulted. Transportation conditions in the country were serious. Railroads that were unable to meet the demands upon them for transportation would be wholly unable to function if they could not secure coal and many of them had not more than two or three days' supply.

Rule 8 of the Railroad Administration's rules which the Commission had recommended be adhered to until experience and study demonstrated that some other rules would be more effective and beneficial was as follows:

8. Private cars and such cars as are assigned to mines by the Car Service Section, United States Railroad Administration, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

It will be noted that under this rule private cars, some of which are owned and used by coal operators, and cars assigned to the mines by the Car Service Section of the Railroad Administration for railroad fuel or for other purposes were designated and treated as "assigned" cars. All other cars were designated and treated as "unassigned" cars.

Rules 9 and 10 of the Railroad Administration's rules were as follows:

9. If the number of assigned cars placed at a mine during any period, as provided in rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements,

will be eliminated, and the remainder of the available car supply prorated to the other mines, based on a revised percentage by reason of such elimination.

10. If the number of assigned cars placed at a mine during any period, as provided in rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

(88) It will be noted that under these rules the "assigned" cars were treated in the same manner as railway fuel cars were treated under the Commission's decisions in the cases hereinbefore cited.

Under the conditions that have been briefly outlined the Commission on April 15, 1920, changed its recommendation of March 2, 1920, and recommended that until further experience and study demonstrated that other rules will be more effective and beneficial the Railroad Administration's rules be continued in effect except that rule 8 should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al., v. H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer v. Chicago & Alton Railroad Co., et als.*, 13 I. C. C. 451, will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.

The Commission also expressed the opinion that an emergency existed requiring immediate action and in the exercise of the authority conferred by paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, it suspended the operation of the then existing rule 8 and directed the observance of rule 8 modified as above, effective April 6, 1920, and until further direction or order of the Commission.

Paragraph (12) of section 1 of the Interstate Commerce act, as amended by section 401 of the Transportation Act, 1920, declares it to be the duty of every carrier by railroad to make just and reasonable distribution of

cars for the transportation of coal among the coal mines served by it whether located on its line or lines or customarily dependent upon it for car supply, and to maintain and apply just and reasonable ratings of such mines during any period when the supply of cars available for such service does not equal the requirements of the mines, and to count each and every car furnished to or used by any such mine for transportation of coal against the mine, and provides a specific penalty for failure or refusal to comply with these requirements.

Paragraph (5) of section 1 of the Interstate Commerce act, as amended by section 400 of the Transportation Act, 1920, provides that charges made for any service rendered or to be rendered by carriers subject to the act shall be just and reasonable. The act does not attempt to define in detail what is a just and reasonable rate, fare or charge, or what is a just and reasonable distribution of cars or rating of mines. The Commission is authorized to determine what is a just and reasonable charge for transportation or what are just and reasonable rules for distribution of cars or rating of mines.

Paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the Transportation Act, 1920, authorizes the Commission whenever it is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to suspend the operation of any or all rules, regulations or practices then established with respect to car service for such time as may be determined by the Commission, and to make such just and reasonable directions with respect to car service as in its opinion will best promote the service in the interest of the public and the commerce of the people. The Com-
(89) mission's direction of April 15, 1920, was issued under authority of that paragraph.

The Commission is of opinion that paragraph (12) of section 1 of the Interstate Commerce act does not change the rule of law laid down in the *Hocking Valley* and *Traer cases, supra*. The paragraph states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court of the United States.

No other definite rule or practical plan has been suggested by the interested parties in the many conferences that have been had on this subject. No rule other than that laid down by the Commission and sustained by the Supreme Court had been presented or tried after the decision of the Supreme Court, hereinbefore cited, until, as stated, the rule was changed under war conditions when the railroads were under federal control and the production, distribution and marketing of coal was under a war time federal administration. The passing of the roads from federal control and the suspension of the operation of the Fuel Administration's rules, together with the transportation conditions and shortage of fuel on hand, created an emergency in which the Commission acted in accordance with its best judgment. Both before and since that action was taken parties interested in or affected thereby have been freely invited to suggest some workable concrete plan under which the railroads can get a dependable supply of the quality of fuel adapted to their uses which can fairly be substituted for the rule to which some objections have been made. No one has suggested such a substitute rule. The nearest approach to it has been an expressed belief that a form of preferential contract could be devised under which the contracting railroad would have first call upon the output of a mine but so far as we are advised no such form of contract has been framed. It seems not inappropriate to say that the coal operators are not able to entirely agree among themselves as to the advantages or disadvantages of the assigned car practice.

Paragraph (15) of section 1 of the Interstate Commerce act, as amended by section 402 of the Transportation Act, 1920, authorizes the Commission to direct priorities in transportation. If priorities were to be prescribed in transportation of bituminous coal it would obviously be necessary to give first priority to that for railway fuel, as was done when priorities were issued by the President's priority agent during the war.

Copies of United States Railroad Administration's Car Service Section Circular CS-31 (Revised) and of the Commission's direction of April 15, 1920, are appended hereto and made a part hereof.

DEFENDANT'S EXHIBIT "B" WITH ANSWER.

INTERSTATE COMMERCE COMMISSION
Washington.

(90) April 15, 1929.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as "assigned" cars. All others cars will be designated as "unassigned" cars.

The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce act, as amended by Section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16,

1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. McGINTY, Secretary.

A true copy:

(Seal) GEORGE B. McGINTY, Secretary.

INTERSTATE COMMERCE COMMISSION
Washington.

(91) March 2, 1920.

Notice to Carriers and Shippers:

The supply of cars available for the transportation of coal is insufficient to meet the demand. Unusual movements incident upon the strike of coal miners has brought about an abnormal location of cars. It is desirable that the proper relocation of cars shall be brought about as rapidly and with as little confusion as is possible. Critical situations still exist in which fuel for essential industries and purposes must be provided. The railroads and the coal operators have all been working under the uniform mine rating and car distribution rules established by the Railroad Administration and those rules seem to be generally satisfactory and to meet with general approval.

To the end that conflicting and contradictory rules on different roads and in different fields may be avoided in the unusual conditions which now exist in the industries and on the roads, the Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial and especially during the remainder of the early spring the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS-31 (Revised) be continued in effect.

GEORGE B. McGINTY, Secretary.

(92) Entered June 30th, 1920.

INJUNCTION ORDER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

Lambert Run Coal Company, Plaintiff, vs. Baltimore & Ohio Railroad Company, Defendant.	Preliminary Injunction.

On the 29th day of June, 1920, came the plaintiff and moved the court for an order of injunction as prayed for in the Bill of Complaint, and tendered in support of its motion the affidavits of Samuel D. Brady, Brooks Fleming, Jr., Claude M. Stubbins, Cletus H. Jenkins, James M. Orr, James H. Allport, R. V. Norris and H. A. Garfield, due notice of said motion having been given the Defendant, and asked leave to file the said affidavits. The Defendant objected to the filing of said affidavits and each of them and moved the court to reject the same; and said objection and motion to reject are now here overruled and it is ordered that said affidavits be and the same are hereby filed. And thereupon the Defendant tendered and asked leave to file its answer to said bill and the exhibits with said answer and it is ordered that said answer and exhibits be and the same are hereby filed. And thereupon the Defendant objected to the hearing or determination of said motion for an injunction by this court or the judge thereof in the absence of two other judges, and moved the court that the judge of the court call to his assistance two other judges of whom one at least shall be a circuit judge, said three judges to hear and determine said motion for an injunction, in accordance with the Act of Congress of October 22, 1913, which objection and motion of the Defendant having been argued by counsel, it is ordered that said objection and motion of Defendant be and the same hereby are overruled. (93) And said motion of the Plaintiff for an injunction, and the motion of the Defendant contained in its answer to dismiss the Bill of Complaint being fully argued by counsel for the Plaintiff and counsel for the Defendant and submitted to the court upon said arguments, said

Bill of Complaint and exhibits, said affidavits filed on behalf of Plaintiff, and said answer with the exhibits thereto of the Defendant, said motion of the Defendant to dismiss the Bill of Complaint is overruled.

The court being of the opinion that Section 1, paragraph (12) of the Interstate Commerce Act expressly provides that "During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine" and that rules 8, 9 and 10 of the Defendant providing for car distribution, which rules are set forth in the Bill of Complaint filed herein, are in direct conflict with said provisions and are therefore void.

It is Adjudged, Ordered and Decreed that the Defendant, the Baltimore & Ohio Railroad Company, a corporation, and all its officers, agents, servants and employes be and they are hereby enjoined, within the jurisdication of this court, during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by the Defendant does not equal the requirements of such mines and until the further order of this court, from distributing to any mine served by it more cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting of each and every car furnished to or used by said mine for transportation of (94) coal against that mine; and that the Defendant, and all its officers, agents, servants and employes be and they are hereby likewise enjoined within the jurisdiction of this court, during any such period and until the further order of this court, from distributing to the said mine of the Plaintiff a lesser number of cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting against the mine of each and every car furnished to or used by it for transportation of coal; and that the Defendant, and all its officers, agents, servants and employes likewise be and they are hereby enjoined, within the jurisdiction of this court, during any such period, and until the further order of

this court from observing or enforcing Defendant's rules numbers 8, 9 and 10 set forth in said Bill of Complaint, or any or either of said rules, or any other rules, regulations or practices having the same or like effect; and that the Defendant, and all its officers, agents, servants and employees be and they are hereby ordered and directed, within the jurisdiction of this court, until the further order of this court, to comply with the provisions of paragraph 12 of Section 1 of the Interstate Commerce Act and, during any such period, to maintain and apply mine ratings to all of the mines served by the Defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it; and that the Defendant, and all its officers, agents, servants and employes be and they are hereby enjoined, within the jurisdiction of this court, during any such period, and until the further order of this court, from adopting or enforcing for any cause, reason or pretext whatsoever any rule, regulation or practice, which, or the result of which, will give to any mine served by the Defendant, cars for transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or less than or different from the (95) ratio of the total number of cars available on Defendant's line for transportation of coal to the total rated capacity of all mines served by Defendant.

And the Defendant expressing its desire to appeal from this order and secure a supersedeas thereto it is ordered that this order shall not in any event be in effect until the 20th day of July, 1920, and until the Plaintiff shall file with the clerk of this court, its bond with surety approved by said clerk, in the penalty of one thousand dollars ($1,000.00), conditioned upon said plaintiff paying to said Defendant all costs and damages resulting from this temporary injunction in case the same shall be dissolved as having been improperly awarded.

Enter: June 30th, 1920.

ALSTON G. DAYTON, Judge.

NOTICE OF MOTION FOR THE ALLOWANCE OF APPEAL.

(96) Filed July 9, 1920.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company.

To Messrs. Butler, Lamb, Foster & Pope, Attorneys for Lambert Run Coal Company:

You are hereby notified that The Baltimore and Ohio Railroad Company, the above-named defendant, will on Monday, July 12, 1920, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, appear before said Circuit Court of Appeals in its court-room at Asheville, North Carolina, and move the court for the allowance of an appeal herein, and will at the same time make motion to suspend the injunction granted herein, and for such other orders as may be necessary.

Dated this 9th day of July, A. D., 1920.

HERBERT R. PRESTON,
Solicitor for The Baltimore and Ohio Railroad Company.

Received a copy of the above notice this 9th day of July, A. D., 1920.

BUTLER, LAMB, FOSTER & POPE,
Solicitors for Lambert Run Coal Company.

(97) Filed July 13th, 1920.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

(ASSIGNMENT OF ERRORS).

Lambert Run Coal Company
vs.
The Baltimore and Ohio Railroad Company. } In Equity.

Comes now the defendant, The Baltimore and Ohio Railroad Company, and says that in the interlocutory order or decree granting an injunction made and entered in the above entitled cause on the 30th day of June, 1920, there is manifest error in this:

1. The District Court of the United States for the Northern District of West Virginia erred in making and entering said order or decree of the 30th day of June, 1920.

2. Said District Court erred in granting the injunction granted by it on the 30th day of June, 1920.

3. Said District Court erred in hearing and determining the appilcation of the plaintiff for an injunction in the absence of three judges, of whom at least one should be a Circuit Judge.

4. The District Judge, presiding in said District Court, erred in hearing and determining the application of the plaintiff for an injunction in the absence of two other judges, at least one of whom should be a Circuit Judge, and in refusing to call to his assistance to hear and determine said application as such two other judges.

5. Said District Court erred in not holding that this cause is a case brought to enjoin, set aside, annul, or suspend in whole or in part, the order of the Interstate Commerce Commission, made by said Commission on the 15th day of April, 1920, which said order was, and is as follows:

"INTERSTATE COMMERCE COMMISSION
"Washington

(98) "April 15, 1920.

"Notice to Carriers and Shippers:

"The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view

of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

"The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio, et al.*, v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Tracr* v. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"The Commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce act, as amended by Section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission."

6. Said District Court erred in not holding that this cause is a case brought to enjoin, set aside, annul or suspend in whole or in part said order of the Interstate Commerce Commission made on the 15th day of April, 1920, (99) of which the Circuit Court of Marion County, West Virginia, had no jurisdiction, and in consequence of which want of jurisdiction of said Circuit Court of Marion County said District Court had and has no jurisdiction of said cause.

7. Said District Court erred in not holding that said order of the Interstate Commerce Commission made on the 15th day of April, 1920, was and is within the jurisdiction and authority of said Commission under and by virtue of the Act to Regulate Commerce as amended, and especially under and by virtue of paragraphs Nos. (10), (11), (12), (13), (14), (15), (16) and (17) of Section 1 of said act as amended by the Transportation Act, 1920.

8. Said District Court erred in not holding that said order of the Interstate Commerce Commission made on the 15th day of April, 1920, was and is a valid enforceable order under and by virtue of the Act to Regulate Commerce as amended and especially under and by virtue of paragraphs Nos. (10), (11), (12), (13), (14), (15), (16) and (17) of Section 1 of said act as amended by the Transportation Act, 1920.

9. Said District Court erred in holding that the rules Nos. 8, 9, and 10 are in conflict with paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920, and void, and in enjoining within the jurisdiction of said court the said defendant and all its officers, agents and employes from observing and enforcing said rules 8, 9, and 10, or any or either of said rules, or any other rules, regulations or practice having the same or like effect. Said rules were and are as follows:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* vs. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

(100) "10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

10. Said District Court erred in holding that in distributing cars for the transportation of coal under and in accordance with said Rules 8, 9 and 10, said defendant does not make a just and reasonable distribution of cars for the transportation of coal among the coal mines served by it.

11. Said District Court erred in holding that in distributing cars for the transportation of coal under and in accordance with said Rules 8, 9 and 10, said defendant does not maintain and apply just and reasonable ratings of the mines served.

12. Said District Court erred in holding that in distributing cars for the transportation of coal under and in accordance with said Rules 8, 9 and 10, said defendant does not count each and every car furnished to or used by the mines to which assigned cars are furnished against such mines.

13. Said District Court erred in holding that during any period when the supply of cars available for the transportation of coal does not equal the requirements of of the mines served by said defendant, said defendant does not, in and by the distribution of such cars under and in accordance with said Rules 8, 9 and 10, maintain and apply just and reasonable ratings of such mines.

14. Said District Court erred in holding that during any period when the supply of cars available for the transportation of coal does not equal the requirements of the mines served by said defendant, said defendant does not, in and by the distribution of such cars under and in accordance with said Rules 8, 9 and 10, count each and every assigned car furnished to or used by any such mine for the transportation of coal against the mine.

(101) 15. Said District Court erred in holding that the assignment of said defendant's railroad fuel cars, foreign railway fuel cars, and private coal cars under and in ac-

cordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

16. Said District Court erred in holding that the assignment of said defendant's railroad fuel cars under and in accordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

17. Said District Court erred in holding that the assignment of foreign railway fuel cars under and in accordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

18. Said District Court erred in holding that the assignment of private coal cars under and in accordance with said Rules 8, 9 and 10, was and is in violation of paragraph (12) of Section 1 of the Act to Regulate Commerce as amended by the Transportation Act, 1920.

19. Said District Court erred in holding that in assigning said defendant's railroad fuel cars, foreign railway fuel cars and private coal cars, said defendant does not maintain or apply just and reasonable ratings of the mines served by it.

20. Said District Court erred in holding that in assigning said defendant's own fuel cars, foreign railway fuel cars and private coal cars, said defendant does not count said cars so assigned against the mine or mines to (102) which the same are assigned.

21. Said District Court erred in holding that during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirements of such mines, the operation or effect of assigning said defendant's railroad fuel cars, foreign railway fuel cars and private coal cars, or any of said classes of cars, to other mines is to distribute to any mine to which such cars are assigned more cars than the said

mine is entitled to under the maintenance or application of its mine rating, or that the operation or effect thereof is not to count each and every car furnished to or used by said mine to which such cars are assigned for the transportation of coal against that mine, or that the operation or effect thereof is to distribute to the mine of the plaintiff a lesser number of cars than said mine is entitled to under the maintenance or application of its mine rating.

22. Said District Court erred in holding that the operation or effect of the assignment of said defendant's railroad fuel cars, foreign railway fuel cars and private coal cars, during any period when the supply of cars available for distribution for the transportation of coal by the mines served by said defendant does not equal the requirements of such mines, is to give to any mine to which said cars are assigned cars for the transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or different from the ratio of the total number of cars available upon said defendant's line for the transportation of coal to the total rated capacity of all mines served by said defendant.

23. Said District Court erred in holding that the operation or effect of the assignment of said defendant's railroad fuel cars, foreign railway fuel cars (103) and private coal cars, during any period when the supply of cars available for distribution for the transportation of coal by the mines served by said defendant does not equal the requirements of such mines, is to give a mine to which such cars are not assigned cars for the transportation of coal in an amount the ratio of which to the rated capacity of the said mine is less than or different from the ratio of the total number of cars available upon said defendant's line for the transportation of coal to the total rated capacity of all mines served by said defendant.

24. Said District Court erred in not holding that the said Court had and has no jurisdiction of the matters and things complained of by the plaintiff, nor to grant relief in respect thereto, it not appearing in or by the bill of

complaint that the matters and things complained of therein have been complained of to the Interstate Commerce Commission or that said Commissions has taken any action or made any order in respect thereto.

25. Said District Court erred in not holding that the determination of the question whether said Rules 8, 9 and 10, and the assignment and distribution of cars under and in accordance therewith were or are valid, reasonable, preferential or discriminatory, or the contrary, was and is in the first instance within the administrative functions of the Interstate Commerce Commission, and that if said rules or the assignment and distribution of cars under and in accordance therewith have not been ordered or authorized by said Commission, said District Court had and has no jurisdiction to determine said question or to grant relief in respect thereto until complaint shall have been made and action taken or an order made in respect thereto by said Commission.

26. Said District Court erred in not holding that the United States was and is an indispensable party to said suit.

(104) 27. Said District Court erred in not holding that the Interstate Commerce Commission was and is an indispensable or necessary party to said suit.

28. Said District Court erred in hearing or determining the plaintiff's application for an injunction in the absence of notice of the hearing to the Interstate Commerce Commission and to the Attorney-General of the United States.

29. Said District Court erred in holding that the emergency powers of the Interstate Commerce Commission under Paragraph (15) of Section 1 of the Act to Regulate Commerce, as amended by the Transportation Act, 1920, did not authorize the making of said order of the 15th day of April, 1920, of said Commission.

30. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any pe-

riod when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirements of such mines, and until the further order of said Court, from distributing to any mine served by it more cars than the said mine is entitled to under the maintenance and application of its mine rating and the counting of each and every car furnished to or used by said mine for transportation of coal against that mine.

31. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirementts of such mines, and until the further order of said Court, from distributing to the mine of the plaintiff a lesser number of cars than the said mine is entitled to under the maintenance and application of (105) its mine rating and the counting against the mine of each and every car furnished to or used by it for transportation of coal.

32. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by defendant does not equal the requirements of such mines, and until the further order of said Court, from observing or enforcing said Rules Nos. 8, 9 or 10, or any of said rules, or any other rules, regulations and practices having the same or like effect.

33. Said District Court erred in ordering and directing within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes, until the further order of said Court, to comply with the provisions of paragraph (12) of Section 1 of the Interstate Commerce Act.

34. Said District Court erred in ordering and direct-

ing within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by said defendant does not equal the requirements of such mines, to maintain and apply mine ratings to all of the mines served by said defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it.

35. Said District Court erred in enjoining within the jurisdiction of said Court the said defendant and all its officers, agents, servants and employes during any period when the supply of cars available for distribution for the transportation of coal produced by the mines served by the defendant does not equal the requirements of such mines, and until the further order of said Court, from (106) adopting or enforcing for any cause, reason or pretext whatsoever, any rule, regulation or practice which, or the result of which, will give to any mine served by the said defendant cars for transportation of coal in an amount the ratio of which to the rated capacity of the said mine is greater or less than or different from the ratio of the total number of cars available on defendant's line for the transportation of coal to the total rated capacity of all mines served by the said defendant.

36. Said District Court erred in not holding that said Court as a court of equity has and had no jurisdiction of this suit.

37. Said District Court erred in not sustaining the motion of said defendant to dismiss the bill of complaint.

Wherefore, this defendant prays that said order or decree of said District Court so made and entered on the 30th day of June, 1920, may be reversed, and that such order or decree may be made and entered, or directed to be made and entered, as the premises may require.

THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

By H. R. PRESTON,
A. HUNTER BOYD, JR.,
HOFFHEIMER & TEMPLEMAN.

H. R. PRESTON,
A. HUNTER BOYD, JR.,
HOFFHEIMER & TEMPLEMAN,
Counsel for Defendant.

MEMORANDUM.

(107) Petition for Appeal, filed July 13, 1920.

Order Allowing Appeal, filed July 13, 1920.

Appeal Bond Penalty $1,000, filed July 13, 1920.
Obligor: Baltimore & Ohio R. R. Co.
Conditioned for Costs and Damages.

Citation Dated July 13, 1920.

Service of Citation Accepted July 13, 1920.
Filed July 13, 1920.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

(108) Northern District of West Virginia, ss:

I, A. T. Barrett, Clerk of the District Court of the United States for the Northern District of West Virginia, hereby certify that the foregoing transcript, is a true and correct copy of all papers filed and orders entered in the District Court of the United States for the Northern District of West Virginia, in the equity cause of the Lambert Run Coal Company vs. The Baltimore and Ohio Railroad Company, as taken from the record and papers on file in my office.

Given under my hand and the seal of said Court, this 15th day of July, 1920.

(Seal of Court) A. T. BARRETT,
Clerk U. S. District Court, Northern District of
West Virginia.

On the same day, to-wit, July 19, 1920, the original petition for an appeal, order allowing appeal, appeal bond and citation, are certified up under Sec. 7 of Rule 14.

Same day, the appearance of H. R. Preston, Geo. M. Hoffheimer and A. Hunter Boyd, Jr., is entered for the appellant.

Same day, the appearance of John A. Howard, Rush C. Butler and Frank E. Harkness is entered for the appellee.

MOTION OF APPELLANT FOR STAY OR SUSPENSION OF INJUNCTION OF DISTRICT COURT.

Filed July 19, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

COMES NOW the Appellant and respectfully moves the Court to grant a stay or suspension of the injunction or the operation or effect of the injunction, ordered by the Court below, during the pendency of this appeal.

H. R. PRESTON,
GEO. M. HOFFHEIMER,
A. HUNTER BOYD, JR.,
Counsel for Appellant.

ARGUMENT OF CAUSE.

July 19, 1920 (July Term, 1920), cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

ORDER STAYING AND SUSPENDING OPERATION AND EFFECT OF INJUNCTION GRANTED BY DISTRICT COURT.

Filed and Entered July 19, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

ON THE MOTION of the Appellant, by its counsel, IT IS ORDERED that the injunction granted by the Court below, and the operation and effect of said injunction, be and the same are hereby stayed and suspended until the decision and determination of this appeal.

July 19, 1920.

J. C. PRITCHARD,
Senior Circuit Judge Presiding.

OPINION.

Filed August 11, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi.

(Argued July 19, 1920. Decided August 11, 1920.)

Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

HERBERT R. PRESTON and GEORGE M. HOFFHEIMER (A. HUNTER BOYD, JR., on brief) for the appellant, and JOHN A. HOWARD, RUSH C. BUTLER and FRANK E. HARKNESS for the appellee: BLACKBURN ESTERLINE, Special Assistant to Attorney General, and P. J. FARRELL, Chief Counsel Interstate Commerce Commission, as *Amici Curiae*.

WOODS, Circuit Judge:

The complainant, a coal mine served by the defendant railroad company, set out in its bill filed in the Circuit Court of Marion County, West Virginia, that it was suffering continuous loss and damage by reason of the refusal of the defendant in a period of shortage of coal cars to comply with the following provision of Section 402, Transportation Act of 1920:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense which may be recovered in a civil action brought by the United States."

Loss and injury was alleged as the result of not counting against mines in the distribution of cars according to the mine ratings all cars to be loaded with railroad fuel coal, thus giving to mines furnishing coal for railroad fuel a preference or priority in the number of cars supplied to the disadvantage of plaintiff's mine and other mines not furnishing railroad fuel coal, or furnishing a less quantity of railroad fuel coal. The resulting disadvantages and losses to the plaintiff are set out in detail in the bill and in affidavits attached thereto. The cars to be thus used for railroad fuel are described as assigned cars.

The plaintiff asked that the defendant be enjoined from continuing its alleged illegal method of distributing coal cars to the mines according to their ratings

without counting against the mine each and every car including railroad coal cars. The cause was removed to the United States District Court for the Northern District of West Virginia. On the merits, the defense set up in the answer is that the rule and practice of the defendant is authorized and required by the following rules of the Interstate Commerce Commission:

"8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio, et al.*, vs. *H. V. R'y Co.*, 12 I. C. C. 398, and *Tracy* vs. *Chicago & Alton Railroad Co., et al.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned cars.'

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

It appears from both bill and answer that the United States Railroad Administration abolished the assigned car rule by order of July 6, 1918. After the passage of the Transportation Act on February 28, 1920, the Interstate Commerce Commission continued the order of July 6, 1918, in force, until April 15, 1920, when it restored the assigned car practice by amending rule 8 and promulgating it in the amended form above quoted.

The amended rule 8 construed in connection with rule 9 is not a reinstatement of the assigned car rule that once existed, namely, that cars assigned for railroad fuel coal were not counted at all, and the mines to which

they were assigned received in addition the same number of unassigned cars according to their rating as if they had received no assigned cars. It does mean, however, that a mine may receive any number of cars assigned for railroad fuel, although in excess of the number of cars due according to its rating, taking all cars into account; and if the assigned cars so received equal or exceed its pro rata share under its rating it receives no unassigned cars. But the assigned cars so received are eliminated from the entire car supply. This reduction of the number of cars to be prorated, manifestly results in not counting each and every car against the mine which receives more cars for railroad fuel than it would be entitled to if all the cars were included in the number to be distributed.

In the order or notice to carriers and shippers promulgating the amended rule, the Commission states that in its opinion an emergency existed by reason of the continued shortage of coal cars, the cessation of government control, and the importance of meeting railroad fuel requirements without the necessity of carriers resorting to confiscation of commercial coal. As authority for this order the Commission relies on Section 1 of the Interstate Commerce Act as amended by Section 402 of Transportation Act of February 28, 1920. The relevant portions of the statute are:

"(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) *to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission;* (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emer-

gency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) *to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them.*"

Attached to the answer is an elaborate written response of the Commission to a Senate resolution directing the Commission to inform the Senate upon what authority, if any, its order or notice of April 15, 1920, was issued. Therein the Commission relied particularly for its authority on the provisions of subdivision 15 which we have italicized.

At the time of the application for the injunction a motion was made to dismiss the bill on the uncontroverted facts appearing in the bill and answer. The motion was denied. The defendant then took the position that since it appeared that the application was really for an injunction restraining the execution of an order of the Interstate Commerce Commission it could be heard and determined only by three judges, of whom one at least should be a circuit judge, after five days' notice to the Interstate Commerce Commission and to the Attorney General. This position was also overruled, and the District Judge made an order enjoining the defendant, in any period of coal car shortage, from distributing cars except in precise accordance with subdivision 12 counting each and every car furnished to a mine against that mine. By its terms this order was limited in its op-

eration to the jurisdiction of the District Court for the Northern District of West Virginia.

We cannot doubt that by subdivision 12 of Section 402 the Congress clearly expressed the intention to abolish all preference to mines furnishing railroad fuel coal under the assigned car rule in periods of ordinary car shortage.

The count of each and every car required is not a mere independent futile enumeration; but a count of each and every car furnished or used against the mine to the end that there should be proportional distribution of all available coal cars resulting in fair and equal opportunity to each mine on the basis of its rating. Before the enactment of the statute the matter had been controlled by rules, regulations and practices made by railroads or the government railroad administration which had been the subject of much controversy. Evidently the Congress having in view this controversy after full consideration settled the matter by an imperative enactment against the assigned car rule in times of ordinary coal car shortage. Thus it appears to us the rules of the Interstate Commerce Commission above set out are not in accord with subdivision 12 of the Transportation Act of 1920, standing alone.

The authority given to the Commission by (a) subdivision 15 in cases of emergency "to suspend the operation of any or all rules, regulations or practices then established with respect to car service" does not extend to the suspension of a positive and definite enactment of the statute covering the subject. Rules, regulations and practices mean the rules, regulations and practices adopted by the Commission or by the railroads in conformity to the act or not forbidden by it, in contradistinction to the definite enactments of the statute. This appears from subdivisions 11 and 14 of the same section and other portions of the statute. If therefore the order of the Commission had no other basis than the authority conferred to suspend rules, regulations and practices it would be without support. *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *United Verde Copper Company*, 196 U. S. 207; *Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Grimaud*, 220 U. S. 506.

The Congress has not, however, conferred on coal

mines equality among themselves—the right of each mine in time of coal car shortage to be furnished cars in proportion to mine ratings without regard to the public welfare and safety. Coal is a public necessity. From many causes crises and emergencies may arise in mine operation, transportation and unexpected needs of the public which cannot be anticipated and justly provided for by inelastic legislative enactment. It would be strange indeed if the Congress had guarded the private interests of the mines by an inflexible exactment of equality, lodging nowhere the power to relieve the public against unforeseen conditions which would make rigid proportionate distribution of cars disastrous to the country or to some portion of it. This would be to confer benefits on individuals at the sacrifice of the public safety and welfare.

We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that "whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority * * * * (d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them."

The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long existing car shortage. But recognizing the necessity of a degree of flexibility, the Congress conferred upon the Commission power in case of a car shortage which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings with preference and priority to such extent as will in its opinion meet the emergency.

All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the Commission when they find an emergency requiring it.

Our conclusion is that the making and promulgation

of rule 8 as amended was clearly within the power of the Commission.

The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised. *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff claiming the benefits of the statute cannot assert the unconstitutionality of its limitations. *Daniels* v. *Tearney*, 102 U. S. 415; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17.

For these reasons the motion to dismiss the bill should have been granted.

Even if the District Court had been right in refusing the motion to dismiss the bill the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a circuit judge, after notice to the Commission and to the Attorney General. Act October 22, 1913, Compiled Statutes, Section 998.

A decree will be entered dissolving the injunction and dismissing the bill.

Reversed.

DECREE.

Filed and Entered August 12, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Appeal from the District Court of the United States for the Northern District of West Virginia.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of West Virginia, at Philippi, with directions to dissolve the injunction and dismiss the bill in accordance with the opinion of this Court.

August 12, 1920.

C. A. WOODS,
U. S. Circuit Judge.

PETITION FOR APPEAL.

Filed Sept. 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

IN EQUITY.

To the Honorable United States Circuit Judge:

Your petitioner, the above named Lambert Run Coal Company, a corporation, feeling aggrieved by the decree rendered and entered in the above entitled cause on the twelfth day of August, 1920, does hereby appeal from said decree for the reasons set forth in the assignment of errors filed herewith. Your petitioner represents that the matter in controversy in said suit exceeds one thousand dollars exclusive of costs, and that this cause is one in which the United States Circuit Court of Appeals has not final jurisdiction and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal. Your petitioner prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such Court in such cases made and provided. And your petitioner further prays that this Court may make the proper order relating to the security to be required of

petitioner on its bond for costs and damages on appeal.

Your petitioner also prays that this Court will make all other necessary orders in this matter as the law and rules direct, and your petitioner as in duty bound will ever pray, etc.

JOHN A. HOWARD,
BUTLER, LAMB[redacted], FOSTER & POPE,
Of Counsel for Lambert Run Coal Co.,
a Corporation, Petitioner.

ASSIGNMENT OF ERRORS.

Filed September 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

Now comes Lambert Run Coal Company in the above entitled cause and files the following assignment of errors, upon which it will rely upon the prosecution of its appeal in the above entitled cause from the decree made and entered by this Honorable Court on the eleventh day of August, 1920.

I.

That the said Circuit Court of Appeals erred in rendering its said decree of the twelfth day of August, 1920,

in which decree the court ordered that the injunction granted by the District Court for the Northern District of West Virginia be dissolved and that the bill be dismissed.

II.

That said Circuit Court of Appeals erred in reversing the decree rendered by the District Court of the United States for the Northern District of West Virginia on June 30, 1920, awarding a temporary injunction as therein and thereby granted.

III.

That said Circuit Court of Appeals erred in holding that paragraph 15 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12 of Section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920.

IV.

The said Circuit Court of Appeals erred in holding that clause "A," paragraph 15 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920.

V.

The said Circuit Court of Appeals erred in holding that clause "D," paragraph 15 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12, Section I of the Interstate

Commerce Act as amended by Section 402 of the Transportation Act of 1920.

VI.

The said Circuit Court of Appeals erred in reaching the following conclusion:

"We think the Congress has clearly conferred on the Commission the power to grant relief in such conditions by providing that 'whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country the Commission shall have and is hereby given authority * * * (d) to give direction for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them.'

"The true construction required by the spirit and the letter of the statute is this: Subdivision 12 provides for equality among coal mines in proportion to ratings, in time of the usual long existing car shortage. But recognizing the necessity of a decree of flexibility, the Congress conferred upon the Commission power in case of a car shortage, which in their opinion was so much beyond the usual as to constitute an emergency, to supplant or modify equality among the mines according to ratings with preference and priority to such extent as will in its opinion meet the emergency.

"All the specific provisions of the statute for equality among designated classes is thus modified by the general provision for their suspension by the Commission when they find an emergency requiring it.

"Our conclusion is that the making and promulgation of rule 8 as amended was clearly within the power of the Commission.

"The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised."

VII.

The said Circuit Court of Appeals erred in reaching the following conclusion:

"The plaintiff's right to equality in the distribution of coal cars was conferred by the statute. The Congress in conferring the right could place upon it any limitations or conditions it saw fit, including the limitation that the right might be suspended by the Interstate Commerce Commission in its discretion without a hearing. The plaintiff claiming the benefits of the statute cannot assert the unconstitutionality of its limitations."

VIII.

The said Circuit Court of Appeals erred in reaching the conclusion that the Interstate Commerce Commission has the power to suspend the operation of paragraph 12, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920, when in the opinion of the said Commission an emergency exists. And that the order so made is not subject to review.

IX.

The said Circuit Court of Appeals erred in reaching the conclusion that clause "D" or any other clause in paragraph 15, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, vests in the Interstate Commerce Commission power to suspend the operation of paragraph 12 of Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of February 28, 1920, under any circumstances. On this subject it is insisted that paragraph 12 is an "Act of Congress" not a "rule, regulation or practice," and is not referred to at all in paragraph 15.

X.

The said Circuit Court of Appeals erred in reaching the following conclusion:

"Even if the District Court had been right in refusing the motion to dismiss the bill the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a circuit judge, after notice to the Commission and to the Attorney General."

It is insisted that this is not a cause in which it is sought to enjoin an order of the Interstate Commerce Commission. This on the ground that paragraph 12, Section I of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920, is a substantive act of Congress imposing on carriers by railroad certain duties and that failure on the part of the defendant railroad company to comply with the provisions of that act, causing the injuries alleged in the bill warrants injunctive relief without regard to anything the Interstate Commerce Commission may have done.

XI.

That said Circuit Court of Appeals erred in its interpretation of clause "D," paragraph 15 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act of 1920, which reads "(d) to give directions for preference or priority in transportation, embargoes or movement of traffic under permits at such time and for such periods as it may determine and to modify, change, suspend or annul them," as referring to or including in its provisions paragraph 12. It is insisted that clause "D" refers only to preferences or priorities in transportation, embargoes or movement of traffic under permits and does not include or in any manner refer to paragraph 12, which deals exclusively with the distribution of the available cars among coal mines.

Wherefore, the said Lambert Run Coal Company prays that the said decree of the said Circuit Court of Appeals be reversed, and that it enter such decree as may be directed by the Supreme Court of the United States.

JOHN A. HOWARD,
BUTLER, LAMB, FOSTER AND POPE,
Of Counsel for Lambert Run Coal Company.

ORDER ALLOWING APPEAL.

Filed September 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

On motion of John A. Howard, solicitor and counsel for Lambert Run Coal Company, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein, on the twelfth day of August, 1920, be, and the same is hereby allowed, as prayed, and that a certified transcript of the record, testimony, exhibits, affidavits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $1,000.00, as a bond for costs and damages on appeal. Said bond to be executed and filed in the Clerk's Office of this Court within fifteen days from this date, and approved by the undersigned.

Sept. 10, 1920.

C. A. WOODS,
U. S. Circuit Judge.

CITATION.

Issued September 10, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

UNITED STATES OF AMERICA, ss:

The President of the United States:

To the Baltimore and Ohio Railroad Company, Appellant in the above styled cause—Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit from a final decree rendered and entered on the twelfth day of August, 1920, in that suit being in equity No. 1846, wherein Baltimore & Ohio Railroad Company is Appellant and Lambert Run Coal Company is Appellee, to show cause, if any there be, why the decree rendered and entered against the said appellee, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable C. A. Woods, United States

Circuit Judge for the Fourth Circuit, this 10th day of September, 1920.

C. A. WOODS,
U. S. Circuit Judge.

Legal service of the above citation is accepted this 13th day of September, 1920.

GEO. M. HOFFHEIMER,
Of Counsel for B. & O. R. R. Company.

APPEAL BOND.

Filed September 15, 1920.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1846.

The Baltimore and Ohio Railroad Company, Appellant,

versus

Lambert Run Coal Company, Appellee.

KNOW ALL MEN BY THESE PRESENTS, that we, Lambert Run Coal Company, a corporation, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto The Baltimore and Ohio Railroad Company, a corporation incorporated under the laws of the State of Maryland, in the full and just sum of $1,000.00 to be paid to said Baltimore and Ohio Railroad Company above named, its successors and assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these pres-

ents. Sealed with our seals and dated this 13th day of September in the year of our Lord One Thousand Nine Hundred and Twenty. Whereas, lately at a court held by the United States Circuit Court of Appeals for the Fourth Circuit in a suit depending in said court between Baltimore & Ohio Railroad Company vs. Lambert Run Coal Company a decree was rendered and entered against the said Lambert Run Coal Company on August 11, 1920. And the said Lambert Run Coal Company having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit and a citation directed to said Baltimore & Ohio Railroad Company, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof.

NOW, condition of the above obligation is such that if the said Lambert Run Coal Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

LAMBERT RUN COAL CO., (Seal)
By CLARENCE D. ROBINSON, Secy. & Tr.
FIDELITY AND DEPOSIT CO. OF MD., (Seal)
By TUSCA MORRIS, Attorney in Fact.
CHAS. W. EVANS, Agent.

(Seal of Surety Co.)

Approved:
C. A. WOODS,
U. S. Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains

upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 18th day of September, A. D., 1920.

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

(Seal of Court)

FILED
OCT 22 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 153

LAMBERT RUN COAL COMPANY, *Appellant*,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, *Appellee*.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO ADVANCE.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Counsel for Appellant.

Press of Byron S. Adams, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 585.

LAMBERT RUN COAL COMPANY, *Appellant*,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, *Appellee*.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION TO ADVANCE.

Come now counsel for the above-named appellant and respectfully move the Court to advance the above entitled cause for early hearing during the October, 1920, term of this Court.

This appeal involves the construction of paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act. Both of these paragraphs were incorporated in the Act by the Transportation Act, 1920, and neither of them has been construed by this Court.

Paragraph (12) provides that during any period in which the supply of cars available for transporta-

tion of coal on any railroad does not equal the requirements of the mines served by it, it shall be the duty of the carrier "to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for the transportation of coal against the mine."

It is claimed by appellant in its bill of complaint, which was filed on behalf of itself and all others similarly situated, that this provision does away with the use of what are known as "assigned cars" and requires the distribution, during any period of coal car shortage, of all coal cars on appellee's railroad on the basis of the respective mine ratings of the mines served by it, and that the carrier is not permitted to adopt any method of coal car distribution inconsistent with this requirement, either of its own motion or by authority of the Interstate Commerce Commission.

It appears from the record, however, that at the time of the hearing of this cause in the District Court, the appellee was distributing coal cars, not in accordance with the requirement of paragraph (12) as construed by appellant, but in accordance with certain regulations authorized by an order or recommendation of the Interstate Commerce Commission applying to all railroads, under which certain mines receive "assigned cars" in excess of the number called for by their mine ratings, and others, including the appellant's, receive fewer cars than their ratings call for. This order, which appears at page 42 of the record, purports to be made under the authority of paragraph (15) of Section 1, which confers on the Commission certain summary powers, to be exercised whenever it is of opinion "that shortage of equip-

ment, congestion of traffic or other emergency requiring immediate action exists in any section of the country."

The District Court for the Northern District of West Virginia sustained the contentions of appellant and granted an injunction *pendente lite* against the continuance of the appellee's method of car distribution. On appeal from this order to the Circuit Court of Appeals for the Fourth Circuit, it was held by that court that the order of the Interstate Commerce Commission above referred to was within the jurisdiction of the Commission and a decree was entered remanding the cause to the District Court with directions to dissolve the injunction and dismiss the bill. This appeal is prosecuted to reverse that decree.

The District Court of the United States for the Northern District of Alabama has also rendered a decision sustaining the jurisdiction of the Interstate Commerce Commission, but upon grounds materially different from those set forth in the opinion of the Circuit Court of Appeals in this cause. Cases involving the same questions are pending in the District Courts for the Southern District of West Virginia and the Western District of Pennsylvania.

The practice of assigning cars to certain mines in excess of their ratable shares works a serious hardship to appellant and other operators who receive no assigned cars, not only by reason of the decrease of production and increase of unit production cost which results directly from the reduction of their car supply, but because of the marked competitive advantage which the beneficiaries of the practice enjoy. It is obviously of peculiar importance to the appellant and all others similarly situated that the question whether

the method of car distribution which subjects them to these disadvantages is warranted by law, should be promptly decided.

The interest of the coal consuming public in an early decision of this controversy is, however, even greater than that of the litigants. The supply and distribution of coal cars is one of the controlling factors not only in the distribution of coal but in its production and price. The stocks of coal on hand in many sections of the country are smaller than ordinary prudence requires at this season of the year. Experience indicates that a shortage of coal cars in inevitable in the winter season, and as the country during the coming winter will be dependent to an unusual degree on the current production of coal for its requirements, a high degree of efficiency in the use of the available facilities for production and distribution will be essential.

If, in this situation, the question whether the distribution of coal cars is controlled by a definite statutory requirement or is subject to discretionary regulation by the Interstate Commerce Commission is left to depend upon litigation in inferior Federal courts, different rules may be established for different railroads or for the same railroad in different regions, with the inevitable result of confusion and loss of efficiency. It is therefore of the highest importance not only to the coal industry and the railroads but to the general public that the questions presented on this appeal should be authoritatively settled by this Court at the earliest possible moment.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Counsel for Appellant.

Supreme Court, U. S.
FILED
NOV 9 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 153

LAMBERT RUN COAL COMPANY,
Petitioner,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

PETITION OF LAMBERT RUN COAL COMPANY FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Solicitors and of Counsel for Petitioner.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. .....

LAMBERT RUN COAL COMPANY,

Petitioner,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Lambert Run Coal Company, respectfully shows to the Court:

That there is pending in this Court, on appeal from the United States Circuit Court of Appeals for the Fourth Circuit, case Number 585, *Lambert Run Coal Company, Appellant* v. *Baltimore & Ohio Railroad Company, Appellee.* As hereinafter set forth, this case involves questions of vital importance not only to the litigants but to the general public, and it is believed that

if, for any reason, it should be held that this Court is without jurisdiction of the appeal above referred to, the decision of the Circuit Court of Appeals should nevertheless be reviewed by writ of certiorari.

That petitioner filed its sworn bill in equity on behalf of itself and all others similarly situated, against The Baltimore and Ohio Railroad Company on June 19, 1920, in the Circuit Court of Marion County in the State of West Virginia. The bill alleged:

That the defendant was a carrier of persons and property in interstate commerce, and as such was subject to the provisions of the Interstate Commerce Act, and that paragraph (12) Section 1 of said act provides as follows:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States." (Rec., 7.)

That petitioner owned and operated a coal mine served by defendant, and that although at the time of the commencement of the suit and for a long time prior thereto there had not been sufficient cars on defendant's line available for the transportation of coal to meet the requirements of the mines served by it, defendant had not

mplied with the provision of said paragraph (12) Sec-
on 1 of the Interstate Commerce Act in the distribu-
on of such cars, in that while it had established just
nd reasonable ratings of the mines served by it, as
equired by the statute, it had failed and refused to
aintain and apply such ratings and count each and
very car furnished to or used by a mine for transpor-
tion of coal against that mine, but on the contrary had
rnished to certain mines cars in excess of the number
which they would have been entitled if their respec-
ve mine ratings had been applied, as required by the
atute, and had furnished to others, including peti-
oner, a smaller number of cars than they were entitled
on the basis of their mine ratings. (Rec., 10.)

That this unlawful method of distribution was carried
n pursuant to certain car distribution rules established
y defendant which were set forth in an exhibit to the
ll (Rec., 31-34) and which authorized the assignment
f cars for the shipment of railway fuel and of privately-
wned cars in excess of the number called for by the rat-
gs of the mines receiving them.

It further appeared from the allegations of the bill
at as it is impracticable for the petitioner to store coal
t its mine, the mine cannot be operated unless cars are
pplied to load the coal as and when it is mined (Rec.,
)), and that the reduced working time caused by the
ilure of the carrier to supply petitioner's mine with its
ll proportion of the available cars materially con-
ibutes to produce the following injurious results to the
etitioner.

The profits from the operation of its mine are directly
educed not only by reason of the reduction in the amount
f coal which it can produce and sell, but by reason of
ie material increase in unit cost of production which

accompanies a reduction in working time without a corresponding reduction in overhead expense. (Rec., 20-21.)

Petitioner's customers have become dissatisfied and the good will of its business has been seriously impaired. (Rec., 21.)

Petitioner's better and more efficient employees tend to leave its employ and secure work in mines which are able to offer more steady employment by reason of having preference in car supply, and petitioner's working force is thus progressively demoralized. (Rec., 21.)

On the other hand mines which receive assigned cars in excess of their proportionate share are thus enabled to keep down their unit costs of production, and to maintain and increase the efficiency of their organizations, with the result that they enjoy marked competitive advantages over petitioner and others similarly situated. (Rec., 21.)

The bill further alleged that the existing car shortage would continue for a long time (Rec., 10), and that defendant would, unless restrained by injunction, continue the above described illegal method of car distribution, and petitioner would continue to suffer the injuries resulting therefrom, and prayed an injunction restraining defendant from observing or enforcing Rules 8, 9 and 10 of the car distribution rules above referred to, or any other rules or practices inconsistent with the requirement of said paragraph (12), Section 1 of the Interstate Commerce Act. (Rec., 22-23.)

On the petition of the defendant (Rec., 38-41), the case was removed to the United States District Court for the Northern District of West Virginia, and a transcript of the record in the Circuit Court of Marion County having been duly filed in the District Court, the defendant presented its motion to dismiss and its answer.

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The motion to dismiss attacked the jurisdiction of the court on the ground that it did not appear that any complaint as to the matter alleged in the bill had been made to the Interstate Commerce Commission or that the Commission had acted in respect thereto, and alleged that the car distribution rules complained of were in fact rules of the Interstate Commerce Commission, that the suit was one to restrain the enforcement of an order of the Commission and that the United States and the Commission were necessary parties to the case. (Rec., 84-85.)

The answer (Rec., 85-93), did not deny that the bill had correctly alleged the facts as to the defendant's method of car distribution nor did it controvert in any way the allegations of the bill as to the injuries resulting to the petitioner therefrom, but alleged that the rules and practice complained of by the petitioner were in all respects according to law and were authorized by an order of the Interstate Commerce Commission dated April 15, 1920, reading as follows:

"NOTICE TO CARRIERS AND SHIPPERS:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel laoding in accordance with the decisions of the In-

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terstate Commerce Commission in *R. R. Comm. of Ohio, et al.* v. *H. V. Ry. Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned cars.' All other cars will be designated as "unassigned' cars.

The Commission is of the opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act, as amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8 modified as above, effective April 15, 1920, and until the further direction or order of the Commission:

By the Commission.

GEORGE B. MCGINTY,
Secretary."
(Rec., 105.)

Amended Rule 8 as set forth in this order is identical with No. 8 of the rules of the defendant referred to in petitioner's bill, and is the principal object of the petitioner's attack.

The cause came on to be heard in the District Court on June 29, 1920, on the petitioner's motion for an injunction *pendente lite*, supported by the sworn bill and affidavits, and on the defendant's motion to dismiss. (Rec., 107.) The court held that paragraph (12) Section 1 of the Interstate Commerce Act prescribed a definite rule for the distribution of coal cars during periods of car shortage, and that paragraph (15) of the same section, under which the order of the Interstate Commerce Commission above set forth and the existing practice of the defendant were sought to be justified, conferred no power or jurisdiction on the Commission to authorize or require any deviation from that rule. The court held further that the existing practice of the defendant of

furnishing to certain mines more cars, and to others, including the petitioner's mine, less, than their respective ratings called for, was in violation of paragraph (12), and it therefore denied the defendant's motion to dismiss and granted a temporary injunction as prayed in the bill. (Rec., 107-108.)

The defendant appealed from this order of injunction to the Circuit Court of Appeals for the Fourth Circuit, and the cause was docketed in that court under the title: *The Baltimore and Ohio Railroad Company, Appellant, v. Lambert Run Coal Company, Appellee,* No. 1846. The Court of Appeals sustained the contention of petitioner and the holding of the District Court that the defendant's method of car distribution did not conform to the requirement of paragraph (12), but held that under clause (d) of paragraph (15) of the same section, the Interstate Commerce Commission was authorized in emergencies to make directions for the distribution of coal cars in a different manner from that provided by paragraph (12) and that the order of April 15, 1920, was a valid exercise of that power, and for this reason, on August 12, 1920, it reversed the injunction order, and remanded the cause to the District Court with directions to dissolve the injunction and dismiss the bill. (Rec., 123-130.)

It is submitted that if this Court has not jurisdiction of the appeal from this decree, the decision of the Circuit Court of Appeals should be reviewed by writ of certiorari for the following reasons:

1. Paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act were introduced into that act by the Transportation Act, 1920, and have not been construed by this court. The construction of these provisions, so far as they relate to the distribution of coal cars,

is of vital importance not only to shippers of coal but to the consuming public.

2. It is held by the Circuit Court of Appeals that the car distribution practice of the defendant does not conform to paragraph (12), but that under a provision of paragraph (15), which authorizes the Interstate Commerce Commission in case of any emergency requiring immediate action "to give directions for preference or priority in transportation, embargoes or movement of traffic under permits," the Commission had power to prescribe a different method of car distribution from that required by paragraph (12). In view of the fact that by the express terms of paragraph (12), the rule which it prescribes is made applicable to any and every period of car shortage, this power to prescribe a different rule necessarily involves a power to suspend the operation of paragraph (12). It is therefore submitted that the decision of the Court of Appeals conflicts with the well established rule that the administrative authority of the Commission is subordinate to all the substantive provisions of the statute, and does not extend to dispensing with any of its requirements, or sanctioning practices which the statute forbids.

3. The departure which the Commission has sanctioned and the Court of Appeals has sustained, from the rule of equality in coal car distribution prescribed by Congress, is of serious public consequence. Not only does it subject producers of coal to the loss and damage alleged in the bill, but it enables the railroads which consume about one-third of all bituminous coal produced in the United States, to shift the entire burden of the increase in cost of coal which is caused by car shortage to the shoulders of private and industrial consumers.

4. Paragraph (12) clearly expresses the intent of

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Congress to prescribe a uniform rule of car distribution, and this intent will be defeated unless the question of its construction and effect is promptly and finally determined by this court. The Circuit Court of Appeals has held in this case that paragraph (12) is "an imperative enactment against the assigned car rule in times of ordinary coal car shortage." (Rec., 128.) We file herewith a certified copy of an opinion handed down by the United States District Court for the Northern District of Alabama in the case of *Corona Coal Company* v. *Southern Railway Company,* in which it is held that paragraph (12) does not prohibit the use of assigned cars at any time. Suits involving the same question are now pending in the Southern District of West Virginia and the Western District of Pennsylvania, and in view of the situation of coal operators who do not receive assigned cars it is improbable that other suits will not be brought. An authoritative decision by this court is, therefore, necessary to avoid the confusion which will be produced by the existence of different rules for car distribution for different railroads or for the same railroad in different districts.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this court and directed to the Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record in all proceedings of said Circuit Court of Appeals in said cause entitled *The Baltimore and Ohio Railroad Company, appellant,* v. *Lambert Run Coal Company, appellee,* No. 1846, to the end that the said cause may be reviewed and determined by this court as provided in Section 240 of the Judicial Code; that said order and decree of the Circuit Court of Appeals in said cause may be re-

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versed by this court, and that your petitioner may have such other and further relief in the premises as to the court may seem proper.

LAMBERT RUN COAL COMPANY,
Petitioner,
By RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Its Solicitors.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Solicitors and of Counsel for Petitioner.

IN THE

Supreme Court of the United States.

October Term, A. D. 1920.

No. .....

LAMBERT RUN COAL COMPANY,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE RECORD IN THIS CASE PRESENTS THE FOLLOWING QUESTIONS:

1. WHETHER PARAGRAPH (12) SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THAT DURING COAL CAR SHORTAGES, EVERY CARRIER BY RAILROAD SHALL APPLY THE MINE RATINGS OF ALL MINES SERVED BY IT, AND DISTRIBUTE ALL AVAILABLE COAL CARS IN ACCORDANCE WITH SUCH RATINGS.

2. WHETHER, ASSUMING THAT PARAGRAPH (12) DOES IMPOSE THIS REQUIREMENT, THE INTERSTATE COMMERCE COMMISSION, ACTING UNDER THE EMERGENCY POWERS CONFERRED BY PARAGRAPH (15) OF THE SAME SECTION, HAS AUTHORITY TO SUSPEND THE CAR SHORTAGE PROVISION OF PARAGRAPH (12), AND DIRECT THAT MINE RATINGS SHALL NOT BE APPLIED.

THESE QUESTIONS ARE NOVEL, AND OF EXTREME IMPORTANCE, NOT ONLY TO PETITIONER AND ALL OTHER COAL PRODUCERS, BUT TO THE GENERAL PUBLIC.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE INTERSTATE COMMERCE COMMISSION'S ORDER DIRECTING A METHOD OF CAR DISTRIBUTION DIFFERENT FROM THAT PRESCRIBED BY PARAGRAPH (12), WAS A VALID EXERCISE OF THE AUTHORITY CONFERRED ON THE COMMISSION BY PARAGRAPH (15), NECESSARILY INVOLVES THE ERRONEOUS PROPOSITION THAT THE COMMISSION, IN THE EXERCISE OF A PURELY ADMINISTRATIVE POWER, MAY SUSPEND THE OPERATION OF A SUBSTANTIVE PROVISION OF THE INTERSTATE COMMERCE ACT, RELIEVE THE CARRIERS OF A SPECIFIC DUTY IMPOSED BY THAT PROVISION, AND PRESCRIBE A RULE IMPOSING A DIFFERENT DUTY.

III.

THE QUESTION OF THE LEGALITY OF THE METHOD OF CAR DISTRIBUTION PRACTICED BY THE RESPONDENT IS NOT ONLY OF VITAL IMPORTANCE TO THE PETITIONER AND ALL COAL PRODUCERS SIMILARLY SITUATED, BUT IT IS ALSO A MATTER OF SERIOUS PUBLIC CONSEQUENCE, SINCE THE RAILROADS ARE ENABLED BY THE USE OF THIS METHOD TO SHIFT THE ENTIRE BURDEN OF THE INCREASED COST OF COAL CAUSED BY CAR SHORTAGE TO OTHER COAL CONSUMERS.

IV.

THERE IS A DIVISION OF OPINION IN THE FEDERAL COURTS AS TO THE CONSTRUCTION AND EFFECT OF PARAGRAPH (12), AND AN AUTHORITATIVE DECISION BY THIS COURT IS NECESSARY IN ORDER TO PREVENT UNCERTAINTY AND CONFUSION AS TO THE PRINCIPLE OF COAL CAR DISTRIBUTION WHICH IT ESTABLISHES.

ARGUMENT.

I.

THE RECORD IN THIS CASE PRESENTS THE FOLLOWING QUESTIONS:

1. WHETHER PARAGRAPH (12) SECTION 1 OF THE INTERSTATE COMMERCE ACT REQUIRES THAT DURING COAL CAR SHORTAGES, EVERY CARRIER BY RAILROAD SHALL APPLY THE MINE RATINGS OF ALL MINES SERVED BY IT, AND DISTRIBUTE ALL AVAILABLE COAL CARS IN ACCORDANCE WITH SUCH RATINGS.

2. WHETHER, ASSUMING THAT PARAGRAPH (12) DOES IMPOSE THIS REQUIREMENT, THE INTERSTATE COMMERCE COMMISSION, ACTING UNDER THE EMERGENCY POWERS CONFERRED BY PARAGRAPH (15) OF THE SAME SECTION, HAS AUTHORITY TO SUSPEND THE CAR SHORTAGE PROVISION OF PARAGRAPH (12), AND DIRECT THAT MINE RATINGS SHALL NOT BE APPLIED.

THESE QUESTIONS ARE NOVEL, AND OF EXTREME IMPORTANCE, NOT ONLY TO PETITIONER AND ALL OTHER COAL PRODUCERS, BUT TO THE GENERAL PUBLIC.

The questions arising upon the record in this case depend wholly upon the construction and effect of paragraphs (12) and (15) of Section 1 of the Interstate Commerce Act, which are set forth in full in the margin.

(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do

Paragraph (12) provides that during any period in which the cars available for the transportation of coal upon a carrier's line do not equal the requirements of the mines served by it, it shall be the duty of the carrier "to maintain and apply just and reasonable ratings of such mines, and to count each and every car furnished to or used by any such mine for the transportation of coal against the mine."

It is contended on behalf of petitioner that this provision requires all available coal cars on the line of a carrier to be distributed among all the mines served by it in proportion to their several ratings, and that it prohibits the method of car distribution provided by the

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shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including mainline track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

rules of the defendant, and commonly known as the "assigned car" practice.

Under this practice cars for railway fuel and privately owned cars, called assigned cars, are furnished to certain mines in excess of the number of cars to which such mines would be entitled on the basis of their mine ratings.

The Circuit Court of Appeals sustained petitioner's contention that this practice did not conform to the provision of paragraph (12), above referred to, but held that under Clause (d) of paragraph (15) the Interstate Commerce Commission was authorized, during car shortages "so much beyond the usual as to constitute an emergency," to prescribe a different rule, and that the Commission's order of April 15, 1920, which directed the adoption of the assigned car rule, was a valid exercise of this authority.

The view taken by the Court of Appeals as to the meaning of the language used in paragraph (12) is contrary to the position taken by respondent in that court, and it is contended by petitioner that the court is in error in its position as to paragraph (15). Both of these provisions were introduced into the Interstate Commerce Act by the Transportation Act, 1920, and neither has been construed by this court. In view of the novelty of the questions involved, and especially because of their importance not only to the litigants, but to the general public, it is believed that they should be determined by this court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE INTERSTATE COMMERCE COMMISSION'S ORDER DIRECTING A METHOD OF CAR DISTRIBUTION DIFFERENT FROM THAT PRESCRIBED BY PARAGRAPH (12), WAS A VALID EXERCISE OF THE AUTHORITY CONFERRED ON THE COMMISSION BY PARAGRAPH (15), NECESSARILY INVOLVES THE ERRONEOUS PROPOSITION THAT THE COMMISSION, IN THE EXERCISE OF A PURELY ADMINISTRATIVE POWER, MAY SUSPEND THE OPERATION OF A SUBSTANTIVE PROVISION OF THE INTERSTATE COMMECE ACT, RELIEVE THE CARRIERS OF A SPECIFIC DUTY IMPOSED BY THAT PROVISION, AND PRESCRIBE A RULE IMPOSING A DIFFERENT DUTY.

The Court of Appeals expressly held that paragraph (12) constituted "an imperative enactment against the assigned car rule in times of ordinary coal car shortage." It sustained the order of the Interstate Commerce Commission and the car distribution rule which it sanctioned, on the theory that in emergencies a discretion was vested in the Commission to prescribe a method of car distribution different from that provided in paragraph (12), by the following language of paragraph (15):

> "Whenever the Commission is of opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, the Commission shall have and is hereby given authority * * * (d) to give directions for preference or priority in transportation, embargoes and movement of traffic under permits at such time and for such periods as it may determine, and to modify, change, suspend or annul them."

This theory is apparently based on the view that Congress intended the "imperative enactment" contained in paragraph (12) to provide only for "ordinary" coal car

shortages, and left extraordinary shortages to be dealt with by the Commission under paragraph (15). Congress did not, however, so limit the operation of paragraph (12). The rule which it prescribed in that paragraph is expressly made applicable "during *any* period" of car shortage, and even if it be granted that the Commission is given power under paragraph (15) to apply a different rule in the case of an unusually acute shortage, it is plain that unless and until the Commission exercises that power, the rule prescribed by paragraph (12) will remain operative. In other words, since the rule prescribed by Congress in terms includes any and every coal car shortage, any power which the Commission may have in the premises is necessarily a power, not, as the Court of Appeals appears to have thought, to make provision for a situation for which Congress has not specifically provided, but to suspend the operation of the rule provided by Congress and prescribe another rule in its place.

The decision of the Court of Appeals therefore necessarily rests upon the proposition that the authority of the Commission "to give directions" conferred by clause (d) of paragraph (15) includes the authority to suspend the operation of the car shortage provision of paragraph (12). And since paragraph (15) makes the Commission the sole and final judge of the question whether an existing emergency calls for the exercise of its emergency powers, it is evident that the Commission might declare any and every coal car shortage to be such an emergency and give "directions" which would effectually prevent the rule prescribed by Congress in paragraph (12) from ever becoming operative and substitute for it a rule prescribed by the Commission.

We have believed the doctrine well established that

the administrative authority of the Interstate Commerce Commission was conferred in furtherance of the purposes and provisions of the Interstate Commerce Act, and was limited and controlled by all its substantive provisions. The holding of the Circuit Court of Appeals in this case that a mere administrative authority "to give directions" can be construed as conferring upon the Commission discretionary power to dispense with such a provision is, so far as we are advised, without any precedent, and we feel justified in asking this court to determine whether it shall become one.

III.

THE QUESTION OF THE LEGALITY OF THE METHOD OF CAR DISTRIBUTION PRACTICED BY THE RESPONDENT IS NOT ONLY OF VITAL IMPORTANCE TO THE PETITIONER AND ALL COAL PRODUCERS SIMILARLY SITUATED, BUT IT IS ALSO A MATTER OF SERIOUS PUBLIC CONSEQUENCE, SINCE THE RAILROADS ARE ENABLED BY THE USE OF THIS METHOD, TO SHIFT THE ENTIRE BURDEN OF THE INCREASED COST OF COAL CAUSED BY CAR SHORTAGE TO OTHER COAL CONSUMERS.

The practical importance to the petitioner and all producers of coal similarly situated, of the question presented by the record is sufficiently indicated by the uncontroverted allegations of the bill as to the injurious results of the "assigned car" practice to operators who do not receive such cars, which are stated in the petition.

The evils resulting from this practice are, however, by no means confined to the coal industry. An increase in the unit cost of coal production inevitably accompanies a shortage of cars, for the reason that a car shortage necessarily curtails production while overhead expense remains constant, and this increase in cost must ulti-

mately be borne in large part by the consumer. If there is discrimination in the distribution of the available supply of cars during such a shortage, the consumer of coal whose supply comes from the less favored mines will obviously be saddled with a relatively large share of this burden.

Under the rule sustained by the Court of Appeals in this case, such discrimination may be practiced to the extent of supplying mines loading railway fuel with a full supply of cars no matter how acute the general car shortage may be, with the result that the unit production cost at such mines will remain normal, while production costs at other mines will reflect not only the general condition of car shortage but will be further increased by reason of the reduction in the number of cars available for general distribution due to the preference of railway fuel mines. In this situation domestic and industrial consumers will be compelled to absorb not only their own proportionate share of the increased cost of coal due to the failure in car supply, but the share of the railroads as well. As the railroads consume one-third of the bituminous coal produced in the United States, it is obvious that the cost of carrying them through a severe car shortage will constitute a considerable item in the coal bill of the general public.

In this connection it should not be forgotten that it is the duty of the carrier to furnish an adequate supply of cars. No doubt car shortages frequently occur from causes beyond the control of the carrier and without any failure in its duty, but it cannot be assumed that this is true always and everywhere, and the assigned car rule may therefore become an instrument by which a carrier can indemnify itself against the consequence of its own default in the performance of its public duty.

In any event the private consumer is in no way responsible for a failure in car supply, and we believe that the question whether Congress has authorized the Interstate Commerce Commission to sanction a practice which enables the railroad to levy a tax on him to pay the expense of frequently recurring car shortages may fairly be urged on this court as one of public and general interest, which warrants the issuance of the writ of certiorari in this case.

IV.

THERE IS A DIVISION OF OPINION IN THE FEDERAL COURTS AS TO THE CONSTRUCTION AND EFFECT OF PARAGRAPH (12), AND AN AUTHORITATIVE DECISION BY THIS COURT IS NECESSARY IN ORDER TO PREVENT UNCERTAINTY AND CONFUSION AS TO THE PRINCIPLE OF COAL CAR DISTRIBUTION WHICH IT ESTABLISHES.

It is clear that Congress intended by paragraph (12) to establish a uniform principle for the regulation of car distribution. This intention will be defeated unless the construction of that paragraph is authoritatively determined by this court.

A conflict of opinion as to the meaning and effect of this provision has already arisen. As we have pointed out, the Circuit Court of Appeals has expressly held in this case that paragraph (12) is an "imperative enactment against the assigned car rule in times of ordinary coal car shortage." The opinion handed down by the United States District Court for the Northern District of Alabama in the case of *Corona Coal Company* v. *Southern Railway Company*, a certified copy of which was filed with the petition, and which is printed as an appendix to this brief, adopts the view that paragraph

(12) does not prohibit the use of assigned cars at any time.

Suits involving the same question are now pending in the Western District of Pennsylvania and the Southern District of West Virginia, and in view of the vital importance of the question to coal operators who do not receive assigned cars it is highly probable that other suits will be instituted. It is evident that a situation may easily arise in which different rules will prevail for different railroads, or for the same railroad in different districts, unless a decision by this court puts an end to the controversy.

This consideration has peculiar weight at the present time. It is matter of common knowledge that the reserve stocks of coal in the United States are smaller than is normal or prudent at this season. Experience indicates that a shortage of coal cars is inevitable during the winter, and as the country will be dependent to an unusual extent during the coming winter on current production of coal, and that production is dependent on car supply, it is obviously of the greatest importance that the law governing the distribution of the available supply of coal cars should not be left in the confusion and uncertainty which will arise from conflicting decisions in inferior federal courts.

RUSH C. BUTLER,
JOHN A. HOWARD,
FRANK E. HARKNESS,
Solicitors and of Counsel for Petitioner.

APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

At Birmingham.

Corona Coal Company, *Plaintiff*,
vs.
Southern Railway Company, *Defendant*.
} In Equity.

Bill to enjoin the defendant and for damages.

Motion to dissolve the interlocutory injunction issued by the State Court. Motion granted.

Johnston & Cocke, of Birmingham, Alabama, and Rush C. Butler, of Chicago, Illinois, Attorneys for Plaintiff.

S. R. Prince, of Washington, D. C., and J. T. Stokely, of Birmingham, Alabama, Attorneys for Defendant.

Henry D. Clayton, District Judge.

The Plaintiff, a Delaware corporation, engaged in the business of mining coal, filed its bill in the Circuit Court of Jefferson County, Alabama, against the defendant Railway, a Virginia corporation. A State Judge granted an interlocutory injunction as prayed for in the bill. The case was removed to this Court and is now submitted on the defendant's motion to dissolve the injunction and on the pleadings, the bill and the answer, each verified,

and affidavits in support of, and in opposition to, the motion.

The basis of the plaintiff's complaint is that the defendant, in the distribution of coal cars to mines located on its railroad in the Birmingham mining district, is violating to the injury of the plaintiff, the provisions of Paragraph 12 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, which paragraph is in these words:

> "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines, or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

The pleadings, affidavits and arguments show that the real issue between the parties is on account of the practice pursued by the defendant in respect to "assigned" cars; that is to say, the defendant delivers its own cars to mines with which it has contracts for fuel for its own use and delivers the cars belonging to other railroads and privately owned cars committed to it for transportation to mines with which said other railroads and owners have contracts for fuel. It is established, indeed, it is not controverted that such cars are counted against the

distributive share of the mines to which assigned, and that such mines are not given a share of the cars available for ordinary commercial shipments unless, and to the extent only, that the assigned cars fail to equal the distributive share of these mines, which receive the assigned cars. The Defendant contends that it has the right to deliver its own cars in any number which may be necessary to obtain fuel to operate its trains, and that the other railroads and private owners have the right to require that the defendants deliver their cars to the mines with which they have contracts for coal—that the possession of such cars was committed to them in each case for that specific purpose. It is further urged by the defendant that during the period of a car shortage, the practice complained of by the plaintiff is necessary in order to enable the defendant and the other railroad Companies to comply with their contracts for fuel supply; and that if a different course be pursued during the periods of car shortage, the defendant and the other railroads would violate their contracts and be compelled to go into the open market for the fuel necessary for the operation of their railroads and compete in the purchase of coal with industrial enterprises and domestic concerns; and would probably have to pay whatever price the coal operators might demand at the time; or, else, the defendant and such other railroads would be forced to confiscate coal for the operation of their trains. It is conceded that confiscation is a vicious practice and not justifiable except in case of extreme necessity.

The defendant urges that the practice complained of is not only in the exercise of a right but is in pursuance of the duty it owes to the traveling and shipping public, to operate its trains, and that if such other railroads and owners of cars committed to defendant for the spe-

cific purpose stated could not have the use of their cars, they would cease to deliver them to the defendant; and that in the case of the said other railroads and owners of private cars, the defendant owed the duty to carry out the purpose for which the cars were committed to it; and further, that the defendant has the common law right to pursue such practice, and has the authority of the Interstate Commerce Commission, clothed with power in such matters, to do this, which authority is in the form of the notice of April 15, 1920, as follows:

"INTERSTATE COMMERCE COMMISSION,
WASHINGTON, April 12, 1920.

Notice to Carriers and Shippers: The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

The Commission recommends that until experience and careful study demonstrates that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (Revised) be continued in effect, except that Rule 8 as contained in said circular should be amended to read:

8. Private cars and cars placed for railroad fuel loading in accordance with the decision of the Interstate Commerce Commission in *R. R. Com. of Ohio et al.* v. *H. V. Ry. Co.* 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.* 13 I. C. C. 451, will be designated as 'assigned cars.' All other cars will be designated as 'unassigned' cars.

The Commission is of the opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of Section 1 of the Interstate Commerce Act as

amended by Section 402 of the Transportation Act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the Interstate Commerce Act of rule 8 modified as above, effective April 16, 1920, and until further direction or order of the Commission.

By the Commission: George B. McGinty, Secretary."

The answer and motion to dissolve the injunction raises the question of whether or not the coal company has appealed to the proper tribunal for redress of the alleged grievance. The railroad insists that the coal mining company should have first gone with its complaint to the Interstate Commerce Commission, which, it is contended, has primary jurisdiction over the controversy between the plaintiff and defendant.

The decision of the question turns upon the effect to be given to paragraph 12, Sec. 1 of the Interstate Commerce Act, as amended by Sec. 402 of the Transportation Act of 1920, herein set out.

In considering the effect and scope of this paragraph, the high and comprehensive administrative powers and duties of the Interstate Commerce Commission must not be forgotten. And it is well to remember that the Acts of Congress furnish repeated evidence of a legislative policy to broaden and add to rather than to narrow and subtract from the powers and useful work of the Commission. Again it is to be borne in mind that the Supreme Court of the United States had often, in interpreting the Interstate Commerce Act and the amendments thereto, given judicial recognition of this legislative policy.

I think the paragraph 12 quoted should be considered and construed in the light of this knowledge, as well as

in pari materia with the other related sections of the Interstate Commerce Law.

Let it be observed that before the passage of the Act of 1920, it was often held by the Commission and the Courts that the carrier should observe just and reasonable rules, regulations and practices with respect to car service; and as a corollary, unjust and unreasonable practices were condemned as unlawful. And the reported cases furnish abundant evidence that the Commission has repeatedly, in cases, somewhat at least resembling this, given redress where just complaints sustained by the evidence have been made.

In the argument of this case, it was admitted by the plaintiff that it had been given by the defendant its proper rating as one of the coal mines on the defendant's railroad. It was also conceded by both parties during the argument that neither the plaintiff nor any other coal mining company in the same district, and on the same railroad, had, in any case during the present car shortage, received a full quota of cars according to the rating of the mine. And it was shown that the defendant did not have a sufficient number of cars to meet the demand of its coal mining patrons.

Prior to the amendment of the Interstate Commerce Law, by the insertion in paragraph 12, the words "and to count each and every car furnished to or used by such mines for transportation of coal against the mines" this rule, now statutory, had been by order of the Interstate Commerce Commission a rule of long standing for the government of railroads; and it had been often sanctioned by the courts in adjudicated cases. So it can be said that this approved rule in effect already law, was by the Transportation Act of 1920, merely crystallized into statutory form. Can it be urged that the fact it is

now embedded in the Transportation Act gives it any more far-reaching or controlling influence over the Commission than it had as a sanctioned rule? Does it subtract from the powers and duties of the Interstate Commerce Commission to see to it in every case that the transportation companies in the matter of car service, follow just and reasonable practices? The Interstate Commerce Commission promulgated the rule as to assigned cars, the Courts sanctioned it and Congress has approved it. Now, must this rule recognized by the Courts as having the force and effect of law, simply because it is at this time a part of the statute, control the question here as the plaintiff insists, or must it be allowed to operate in harmony with the other provisions of the Interstate Commerce Law as it has heretofore, and to the end that the Commission shall have the power to compel the transportation companies to conduct business in a fair, just and reasonable way, in view of all the circumstances arising in the case of car shortage?

Let it be remembered that it was said in the *Penn. R. R. Co.* v. *Puritan Coal Co.* 237 U. S. 121, that

> "* * * it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one unpromulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule or practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative powers which have been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no Court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must

be sought before the Commission or in the United States Courts of competent jurisdiction, as provided in Section 9. But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages occasioned by its violation, or discriminatory enforcement, there is no administrative question involved, the courts being called upon to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage."

This case draws the line of demarkation between that class of complaints which may be heard by the Courts and the other class that must be dealt with by the Commission. If the practice itself is attacked as unfair and discriminatory, the exercise of the judgment and discretion of the Commission is called for, but until that body had declared the practice to be discriminatory and unjust, no Court has jurisdiction of an interstate carrier (defendant here is such) for damages (this bill seeks damages as well as injunction) occasioned by the operation of such practice.

I think it is clear in the instant case that the bill attacks the practice itself, and not the unequal application by the defendant of such practice. *Texas Pacific R. R. Co.* v. *Abilene Cotton Oil Co.* 24 U. S. 426. *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.* 215 U. S. 481, *Morrisdale Coal Co.* v. *Penn. R. R. Co.* 230 U. S. 304. *Loomis* v. *Lehigh Valley R. R. Co.* 240 U. S. 43. And if so, this Court is without jurisdiction at this time to grant relief to the plaintiff. This must be true unless paragraph 12 quoted takes the case from under the influence of the decision in adjudicated cases and out of the primary jurisdiction of the Interstate Commerce Commission during a period of car shortage, such as is shown to exist at this time. It is to be noted that this paragraph 12 that "during any period when the supply of cars available for such service does not equal the requirements of

such mines, it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished and used by such mines for transportation of coal against the mines." Also that paragraph (6) of Section 400 of the Transportation Act of 1920, makes it the duty of common carriers to establish, observe and enforce reasonable and just classifications of property for transportation and all other matters relating to, or connected with, the receiving and transporting of the same, and every unjust and unreasonable classification, regulation and practice is prohibited and declared to be unlawful. Paragraph (10) defines car service to include the use, control, distribution, exchange, return of locomotive cars, etc.; further, paragraph (11) makes it the duty of the carrier to furnish safe and adequate car service and to establish, *observe and enforce just and reasonable rules and regulations with respect to car service.* Paragraph (13) authorizes the Commission to require all carriers to file with it rules and regulations with respect to car service, etc.; paragraph (14) empowers the Commission "on complaint or upon its own initiative" to *establish reasonable rules, regulations and practices with respect to car service* by carrier, including the compensation to be paid for the use of any locomotive, car or other vehicle not owned by the carrier using it, etc." And paragraph (15) *authorizes the Commission in case of shortage of equipment, congestion of traffic or other emergency, upon complaint, or upon its own initiative, to suspend the operation of any, or all, rules, regulations or practices with respect to car service, for such time as may be determined by the Commission; to make just and reasonable direction with respect to car service without regard to the ownership during such emergency which will best promote the service in the interest of the public,* and upon

such terms of compensation as between carriers as they may agree upon, or as the Commission finds to be just and reasonable; and to give directions for preference or priority in transportation, embargoes or movement of traffic under permits, and to modify, change, suspend or annul them. Paragraph (17) provides that the direction of the Commission as to car service, and to the matters referred to in paragraph (15) and (16) may be made through, and by, such agents or agencies as the Commission may designate and appoint for that purpose.

An examination of the Transportation Act shows that Congress has not declared in paragraph 12, or elsewhere, that in a case like the one now here, the pro rata plan of distribution shall be applied to assigned cars according to mine rating, as in the case of ordinary commercial cars; but the statute says no more than such "assigned cars shall be counted against the mine receiving them." What shall be done in a case like the one before me where most of the available cars are assigned cars, Congress has not declared, but has left it, I think, is a matter to be examined into, heard, adjusted and settled, or at least passed upon, by the Interstate Commerce Commission. The effect of the plaintiff's contention is that during the period of inadequate car supply, the carrier must maintain and apply reasonable ratings of the mines which it serves and distribute all available cars in proportion of such ratings, whether such cars, or any or all of them, be assigned cars.

The origin and history of the phrase "*apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mines* for transportation of coal *against the mines,*" shows the reason for its adoption by the Commission and its incorporation, afterwards, into the statute. Congress knew

that at one time assigned cars were not taken into account in the distribution by the carriers to mines served by them, and that the mines receiving assigned cars were given the same pro rata share of the ordinary commercial cars as were given to the mines that received no assigned cars, and that the assigned cars were not counted against the mines favored with them. In *Hocking Valley Case* 12, I. C. R. R. 398, and in the *Traer case*, 13 L. C. R. 451, this practice was complained of and held to be unjust and not to be allowed. When the question came before the Supreme Court of the United States the decision was upheld in *I. C.* v. *Ill. C. R. R. Co.* 215 U. S. 451. It is well to read the opinion in the Traer case rendered by Commissioner Clark, now Chairman of the interstate Commerce Commission.

It may be ventured that Congress did not intend to change the meaning of the phrase "count against the mine" or to enlarge the scope of the rule which is referred to in the *Ill. C. R. R. Co. case, supra*, and the *Morrisdale Coal Co. case, supra.*

In the argument of this case, the statement of Commissioner Clark made before the House Committee on interstate and foreign commerce, when it had under consideration the Esch-Cummings Bill, which put into statutory law the rule found in paragraph 12, hereinbefore referred to, was read to me; and at the same time, the pertinent part of the report of the House Committee was stated. Undoubtedly, this report shows that the House Committee understood what the language "and to count each and every car furnished to or used by such mines for transportation of coal against the mines" meant, and gave legislative sanction, so far as it could, to the application of this rule theretofore adopted by the Commission and approved by the Courts. And from the

hearings of the Committee and its report, it is evident that it was not intended to say assigned cars should in any event be prorated among the mines.

It must be said that the opinions of the Interstate Commerce Commission in *giving the working construction of the Interstate Commerce Act* and its amendments, while not binding upon the Court, is, nevertheless, deserving of serious and deferential consideration. The fact that the Commission made the ruling of April 15, 1920, which is hereinbefore set out, shows it did not consider that paragraph 12 ousted the Commission of its jurisdiction in the matter of coal car distribution during the periods of car shortage, or, in other words, that the Commission was deprived of its administrative power in making distribution of cars in the case of car shortage. As I have said, the statute does not declare that assigned cars shall be prorated. Certainly it does not say that they shall stand idle on the sidetracks of the railroad until the ordinary commercial cars received by mines which have no assigned cars shall equal the number of assigned cars received by, and counted against, the mines furnished with assigned cars. Moreover, there is forceful evidence of the Commission's construction of paragraph 12, found in the words of the Chairman of the Commission, for in the inception of this controversy, and before this bill was brought, this plaintiff here applied to the Chairman of the Commission and received an informal hearing of the very matter involved in this case. At that time, the following statement was made by the Chairman (Mr. Clark):

> "The Chairman: Let me say, in order that there may be no misunderstanding of our view, that some reference has been made to the Transportation Act requiring that the railroads shall count against the mines assigned cars, which left me with the impres-

sion that it was believed that that Act, properly construed, means that a railroad may not use assigned cars if such use results in giving a mine more than its pro rata distribution.

Now, we do not accept that interpretation of it at all. We are very certain that it does not mean that at all. It means just what this Commission laid down as the rule in the Traer case. That is the intention of the Act, and this is the interpretation we place upon it."

On consideration of paragraph 12 and the other provisions of the Transportation Act, and the purpose for which the Interstate Commerce Commission was created and clothed with authority, I am constrained to believe that the plaintiff has presented a case for administrative intervention and not one calling for the exercise of a judicial function. At the expense of repetition, I must say that paragraph 12 does not call for a pro rata division of assigned cars, nor does it say what shall be done with them except that they shall be counted against the mines to which they are assigned. If the plaintiff's interpretation of paragraph 12 should be followed, it would be to read into the statute a provision which it does not contain and which it seems clear that Congress failed, or refused, to write there, or elsewhere, as a part of the Act. It would have been a very easy matter if Congress had adopted the plaintiff's view to have added to paragraph (12) words of this purport: "there shall be distributed to the mines their proportionate number of cars according to mine ratings, whether or not the cars, or any of them, be assigned cars."

Congress did not adopt such idea and for the Courts to adopt it, would be to add to the statute, and would, in effect, also greatly tend to destroy the power and usefulness of the Interstate Commerce Commission in time of distress and car shortage; and cause confusion in the

distribution of cars in the mining districts. This condition would probably extend as a consequence, to other industries. Moreover, for the Courts to assume jurisdiction over cases like the one presented by the plaintiff, would be a suggestion that the Courts be invited to interfere in all similar controversies between mines and railroads. This would force the Courts to go very largely in the business of railroad and mine administration, and thereby, to the extent of such interference, would be imposed insuperable work of mere direction and management, and not of a judicial character. The Courts are not fitted for such duties, but the Interstate Commerce Commission is especially and well designated for that field of usefulness.

It is also urged that the bill is without equity because the plaintiff has a plain and adequate remedy at law. Perhaps so. For whatever injury the plaintiff might sustain by the alleged conduct of the defendant, it might be that damages could be recovered in an action at law; and probably it would be no answer to say that the facts presented here operate to place the plaintiff's cause among that class of rare cases where a Court of Equity may assume jurisdiction of a controversy in order to prevent a multiplicity of suits. See the authorities referred to in *M. L. & W. Power Co.* v. *Charles,* 258 Fed. 726-727. In the view I have taken of this case, it is not necessary for that question to be decided.

I have concluded that the real purpose of paragraph 12 was to carry into the statute what had been a requirement of the Interstate Commerce Commission; that is, that each car must be counted against the mine to which assigned in determining whether the assigned cars equal or exceed the distributive share of such mine; and I believe that all other pertinent questions arising in such a

case as this pending one, were left to the discretion and judgment of the Commission.

The plaintiff's grievance should have been taken to the Interstate Commerce Commission, and, therefore, this Court is without jurisdiction. The motion to dissolve the injunction issued out of the Circuit Court of Jefferson County, Alabama, is granted and the appropriate order will be entered.